Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, et al., Petitioners,

-vs-

THE TOWNSHIP OF SOMERFORD ET AL., Respondents,

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, et al., Petitioners,

-vs-

THE STATE OF OHIO, DEPARTMENT OF TRANSPORTATION, AND NINO CAVALIERE Respondents,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

Donald Weisberger
Ohio Reg. No. 0000908
Suite 1401
75 Public Square Building
Cleveland, Ohio 44113
(216) 621 - 7113
(216) 621 - 5777 FAX

Counsel of Record for Petitioners' Kniskerns and Cavalieres

42 pp

QUESTIONS PRESENTED

WHETHER, THE FOURTEENTH AMENDMENT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAW PROTECTS PETITIONERS FROM THE STATE'S VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS THAT DIRECTED THE DECISION OF THE OHIO SUPREME COURT BY ITS ENACTMENT OF AMENDED SUBSTITUTE HOUSE BILL NO. 350, THAT DEPRIVED THE OHIO SUPREME COURT OF ITS JURISDICTIONAL APPELLATE AUTHORITY OVER PETITIONERS' MEMORANDUM IN SUPPORT OF JURISDICTION THEN PENDING IN THE OHIO SUPREME COURT, DEPRIVING PETITIONERS OF A FAIR AND IMPARTIAL HEARING IN THAT COURT OF THEIR QUEST FOR A TRIAL, ARISING FROM THE COURT OF CLAIMS SUMMARY JUDGMENT IN FAVOR OF THE STATE AGENCY, ODOT, AND THE STATE'S POLITICAL SUBDIVISIONS?

WHETHER, THE FOURTEENTH AMENDMENT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAW, PROTECTS PETITIONERS' RIGHTS UNDER THE BILL OF RIGHTS, OF THE OHIO CONSTITUTION § 16, ARTICLE I, ENTITLING THEM IN THEIR SUIT AGAINST THE STATE AGENCY IN THE STATE COURT OF CLAIMS, TO HAVE THE RULES OF LAW APPLICABLE TO PRIVATE PARTIES CONTROL THE ADJUDICATION OF THEIR ACTIONS?

WHETHER, THE FOURTEENTH AMENDMENT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAW PROTECT PETITIONERS, FROM THE STATUTORY AND JUDICIAL REIMPOSITION OF SOVEREIGN IMMUNITY LAW

CONTROLLING THE ADJUDICATION OF THEIR ACTIONS AGAINST A STATE AGENCY AND THE STATE'S POLITICAL SUBDIVISIONS IN THE STATE COURT OF CLAIMS, FOLLOWING THE ENACTMENT OF §16 ARTICLE I OF THE OHIO CONSTITUTION, THE STATE'S STATUTORY WAIVER OF ITS SOVEREIGN IMMUNITY AND ITS JUDICIAL ABOLISHMENT AS TO POLITICIAL SUBDIVISIONS "TO THE EXTENT IT WAS ROOTED IN COMMON LAW"?

WHETHER, PETITIONERS' COMMON LAW AND STATUTORY RIGHTS OF LIABILITY FOR NUISANCE AND NEGLIGENCE ASSERTED AGAINST STATE RESPONDENTS AND SUPPORTED BY MATERIAL SUMMARY JUDGMENT EVIDENCE IN THE OHIO COURT OF CLAIMS THAT GUARDRAIL WAS LOCATED IN PART, ON THE PAVED SHOULDER OF INTERSTATE HIGHWAY I-70 UPON WHICH RESPONDENT DRIVER MADE CONTACT WAS ONE OF THE PROXIMATE JOINT AND CONCURRENT CAUSES OF PETITIONERS DEATHS AND INJURIES, ARE PROTECTED UNDER THE SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF LAW OF § 16, ARTICLE I OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION FROM SUMMARY JUDGMENT, BECAUSE AS A MATTER OF OHIO LAW IT IS A TRIALABLE ISSUE UNDER PETITIONERS' FACTS AND THE AUTHORITY OF ADKINS V. VILLAGE OF ONTARIO (1983), 8 OHIO ST.3d 45, 457 N.E.2d 317?

LIST OF PARTIES

PETITIONERS:

JAMES KNISKERN, ADMINISTRATOR OF THE ESTATES OF CYNTHIA ANN CAVALIER, JENNIFER KNISKERN, & FELINA CAVALIERE;

GUY CAVALIERE;

JOANNA CAVALIERE & MARIA CAVALIERE, MINORS, BY AND THROUGH THEIR FATHER AND NATURAL GUARDIAN, GUY CAVALIERE

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO;

ALLSTATE INSURANCE COMPANY

RESPONDENTS:

THE TOWNSHIP OF SOMERFORD, TRUSTEES:

WALTER BETHEL
DAVID DAHUME
JAMES MORAN

THE COUNTY OF MADISON, COMMISSIONERS:

HERBERT C. MARKLEY
ROBERT EDWARDS
JOE D. YODER

NINO CAVALIERE

WESTERN RESERVE MUTUAL CASUALTY INSURANCE CO

THE STATE OF OHIO

THE STATE OF OHIO DEPARTMENT OF TRANSPORTATION (ODOT)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

LIST OF PARTIES..... iii

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES..... ix

CITATIONS OF UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED BY THE COURTS..... 1

STATEMENT OF JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED STATUTES INVOLVED:..... 3

STATEMENT OF THE CASE..... 3

ARGUMENT..... 8

REASONS FOR GRANTING THE WRIT

I.

The Ohio Supreme Court and the Ohio Court of Appeals, Tenth Appellate District decided and created Fourteenth Amendment Federal, and Section 16, Article I, State constitutional due process and equal protection questions that have not been, but should be decided by this Court, because the State of Ohio has embarked on a policy of misuse of State governmental powers by reimposing through legislative and judicial action, utilizing both sovereign immunity case and statutory law that was abolished by Section 16, Article I of the Ohio

Constitution' Bill of Rights, judicial decree, and by the State statutorily consenting in Ohio R.C. § 2743.02(A)(1), to have its liablity to Petitioners adjudicated in its Court of Claims in accordance with the rules of law applicable to suits between private parties, and arbitrarily adjudicated Petitioners' wrongful deaths and survivors claims utilizing sovereign immunity law that it had provided as a defense for the highway maintainence duties it had delegated to the Respondents, the political subdivisions, as a legal basis for granting summary judgments in favor of the State Respondents, depriving Petitioners of the applicable substantive state law that is constitutionally protected from sovereignimmunity.....8

II

The affirmance by the Appellate Court of the Court of Claims' summary judgment, when the trial judge had adjudicated the contested material facts of Petitioners' experts to reach the decision that the accident site guardrail was not a nuisance as a matter law, wherein the Court ignored the rules of law applicable to suits between private parties articulated in the leading case of Taylor v Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724, (1944) deprived Petitioners of their constitutional substantive and procedural due process rights protected both by the entire Section 16, Article I of the Ohio Constitution and the Federal Fourteenth Amendment that can only be vindicated in this Court.....17

III

The State of Ohio's reservation and retention of the right to control the outcome of litigation of its liability and the liability of the State Respondents in its Court of Claims by legislative acts, contravenes Section 16, Article I of the Ohio Constitution because it usurps the limited power granted the Legislature to direct the court and manner the state may be sued, in that it permits the state to maintain sovereign immunity over its liability in the Court of Claims through inter alia., by violating the doctrine of separation of powers, an ultra vires act that contravens the State's statutory waiver contained in Ohio R.C. § 2743.02(A)(1), that constitutes a Federal Fifth Amendment taking by the States of Petitioners' wrongful death and survival actions against the State Respondents without just compensation and a deprivation of their state and federal substantive and procedural due process and equal protection of the laws rights, under the Federal Fourteenth Amendment and State's Section 16, Article I Bill of Rights.....24

CONCLUSION.....28

APPENDIX:
OPINION AND JUDGMENT OF THE OHIO COURT OF CLAIMS (August 15, 1995)..A30

OPINION AND JUDGMENT OF THE OHIO COURT OF APPEALS OF FRANKLIN COUNTY (June 28, 1996).....A3

OHIO SUPREME COURT JUDGMENT DECLINING PETITIONERS' MEMORANDUM IN SUPPORT OF JURISDICTION (December 20, 1996)...A2

OHIO SUPREME COURT JUDGMENT DENYING PETITIONERS MOTION TO RECONSIDER MEMORANDUM IN SUPPORT OF JURISDICTION (January 29, 1997).....A1

PETITIONERS AFFIDAVIT EVIDENCE OF THEIR EXPERT MAURICE E. BRONSTAD...A39

PETITIONERS AFFIDAVIT EVIDENCE OF THEIR EXPERT JOSEPH MEYERS.....A51

23 U.S.C. §§ 101.....A94

23 U.S.C. 103.....A104

Ohio R.C. § 2743.02(A)(1).....A63

Ohio R.C. § 2744.02(B)(3).....A77

Ohio R.C. § 2744.03(E)(1).....A81

Ohio R.C. § 5535.15.....A67

Ohio R.C. § 5591.36.....A69,A93

Ohio R.C. § 5591.37 .....A70,A94

Ohio Amended Substitute House Bill No. 350 (Amending the Ohio statutes above)..... A70

Section 16, Article I, Bill of Rights, Ohio Constitution, ...A58

Section 2, Article IV, Ohio Constitution.....A58

Fourteenth Amendment to the U.S. Constitution A60

Fifth Amendment to the U.S. Constitution..... A125

OTHER JURISDICTIONAL MEMORANDA

Petitioners Memorandum in Support of Jurisdiction to Ohio Supreme Court.....A136

Petitioners Motion For Reconsideration to Ohio Supreme Court.....A126

TABLE OF AUTHORITIES

CASES:

pages

Adkins v Village of Ontario, 8 Ohio St.3d 45, 457 N.E.2d 317 (1983).....19,20

Albain v Flower Hospital, 50 Ohio St.3d 251, 553 N.E.2d 1038 at pg. 1047, 3 ALR5th 1006 at pgs 1019-20, (1990).....13

Delaware v Van Arsdall, 475 US 673 at pgs. 690-708, 89 Led2d 674 at pgs 690-701, 106 S Ct 1431, (1986). Dissenting opinion of Justice Stevens.....9

Fabrey v McDonald Police Department, 70 Ohio St.3d 351, 639 N.E.2d 31,(1994), Syllabus 1-3.....13

Federal Deposit Insurance Corporation v Meyer, 510 US __ 127 L Ed2d 308, 114 S Ct 996, (1994).....23

Garret v Sandusky, 68 Ohio St.3d 139, 624 N.E.2d 704 at pgs. 706-708 (1994), Concurring opinion of Justice Pfeifer.....12

Jones v State Bd. of Ed. of Tennessee, 397 U.S. 31, 25 LEd 2d 27 at pg.29, 90 S Ct 779 (1970).....28

Krause v. State,
31 Ohio St.2d 132,
285 N.E.2d 736, (1972)
Syllabus 1-5.....11

Manufacturer's National Bank of Detroit v Erie County Road Commission, 63 Ohio St.3d 318,
587 N.E.2d 819, (1992).....18

Martinez v. California, 444 U.S. 277, 62 L Ed2d 481 at 487,
100 S Ct 553 (1980).....2

Munn v Illinois, 94 US 113,
at pg. 134, 24 L Ed 77
at pg. 87 (1877).....10

Newton v. Court of Claims,
73 Ohio St3d. 553,
653 N.E.2d 366 (1995)..... 15

Nicoletti v Brown, 740 F. Supp. 1268,(1987).....27

Pruneyard Shopping Center v. Robins, 447 U.S 74,
64 L Ed2d 741 at pg. 751,
100 S Ct 2035 (1980).....2

Strunk v Dayton Power & Light, Ohio St.3d 429,
453 N.E.2d 604 (1983).....20

Taylor v Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724, (1944) 17

Usery v. Turner Elkhorn Mining Co., 428 US 1 at pg. 17, 49 L Ed2d 752 at pg 767,
96 S Ct 2882 (1976).....22

OTHER AUTHORITIES:

Petitioners Affidavit Evidence Of Their Expert Maurice E. Bronstad.....4,5

Petitioners Affidavit Evidence Of Their Expert Joseph Meyers.....5

STATUTES & CONSTITUTIONAL PROVISIONS:

23 U.S.C. § 101.....5

23 U.S.C. § 103.....5

Ohio R.C. § 2743.02(A)(1).....9, 11,13,23,24

Ohio R.C. § 2744.02(B)(3)....6,15,18

Ohio R.C. § 2743.03(E)(1).....14

Ohio R.C. § 5535.15.....18

Ohio R.C. § 5591.36.....18,25

Ohio R.C. § 5591.37 18

Amended Substitute House Bill No. 350.....21,22,27

Section 16, Article 1, Bill of Rights, Ohio Constitution, ...3 7,8,9,11,14,17,19,24,26,28,29

Section 2, Article IV, Ohio Constitution.....22

Fourteenth Amendment to the U.S. Constitution 3 7,8,9,17,19,24,26,29

Fifth Amendment U.S. Const.....19,26

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

Petitioners pray that writs of certiorari issue to review both the judgment of the Ohio Supreme Court denying Petitioners' Motion for Reconsideration, and its judgment denying certiorari to Petitioners to review the judgment of the Ohio Court of Appeals, Tenth Appellate District, affirming summary judgments in favor of all of the State Respondents and Respondent Insurer. Petitioners further pray that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, Tenth Appellate District, affirming summary judgments in favor of all of the State Respondents and Respondent Insurer.

OPINIONS BELOW

The January 29, 1997 Journal Entry of the Ohio Supreme Court denying Petitioners' Motion For Reconsideration,

pg. A1. The Ohio Supreme Court 12/20/96 Journal Entry declining jurisdiction, pg. A2. The 6/28/96 Opinion and Journal Entry of the Ohio Court of Appeals, Tenth District pgs. A3. The Opinion and Journal Entry of the Ohio Court of Claims dated August 15, 1995 Appdx. pg. A30.

STATEMENT OF JURISDICTION

The judgment of the Ohio Supreme Court declining jurisdiction was entered on December 20, 1996. Petitioners' application for reconsideration was denied by that Court on January 29, 1997. The jurisdiction of this Court is invoked under 28 USCS § 1257(a). Pruneyard Shopping Center v. Robins (1980), 447 U.S 74, 64 L Ed2d 741 at pg. 751, 100 S Ct 2035, holds:

> **"It has long been established that a state constitutional provision is a "statute" within the meaning of § 1257(2)" and "Appeal is thus the proper method of review."**

Martinez v. California (1980), 444

U.S. 277, 62 L Ed2d 481 at 487, 100 S Ct 553, recognizes:

> **"the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause" and "..the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."**

Petitioners as Ohio and U.S. citizens contend that the State action is and has been wholly arbitrary and irrational.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth and Fifth Amendments to the U. S. Constitution pg. A125. § 16, Article I of the Ohio State Constitution at A58.

STATUTORY PROVISIONS INVOLVED

23 U.S.C. §§ 101 & 103; Ohio R.C. §§ 2743.02(A)(1), 2744.03(E)(1), & 2744.02(B)(3); Ohio R. C. §§§ 5535.15, 5591.36 & 5591.37.

STATEMENT OF THE CASE

Petitioners first raised a federal

question in the Court of Claims through expert M. E. Bronstad P.E., p. A42 by his summary judgment affidavit. He stated that ODOT acted independently and under the Federal Highway Safety Act of 1966 by adopting a 30 foot wide clear zone. ODOT had incorporated it into I-70 for the purpose of giving most motorists who errantly encroach on the roadside, an opportunity to recover control of the vehicle and return to the travellway without further incident. He concluded that the accident guardrail was not built according to the plans of the project and was built using an obsolete drawing; that had it been built properly the van in which Petitioners were riding would have been redirected back onto the paved shoulder of I-70 precluding the disaster that occurred. The photographs submitted establish the acident site guardrail is on the paved shoulder where it attaches

to the bridge. See affidavit at pg. A39. Also see affidavit of Joseph P. Meyers registered engineer at pgs. A51.

The Court of Claims improperly weighed the evidence of Bronsted's affidavit against his deposition testimony and concluded that the accident occurred off the paved portion of the highway; that none of the Respondents were liable; that no duty was owed to Petitioners. The Court granted summary judgments in favor of all Respondents except the driver. See pg A36.

On appeal, see opinion A6, Petitioners asserted that the Court was required to apply the definitions of public highway as appears in 23 USCS §§ 101 & 103, in determining whether the accident occurred on the public highway in determining the County and Township duty of to keep the public highways and public grounds in their political

subdivision free from nuisance under R. C. § 2744.02(B)(3). The Appellate Court affirmed in its opinion at pg. A3. It held, at A19, that the guardrail could not be considered a nuisance as a matter of law even if negligently designed finding:

> **"there is no doubt that the guardrail was located outside the regularly travelled portion of the road and that it did not affect the safety of the highway for regular and ordinary course of traffic."**

Petitioners' Memorandum in Support of Jurisdiction filed with the Ohio Supreme Court reiterated the same federal question at A36. After the issues were briefed by Respondents, the Ohio Legislature enacted a series of statutes that repealed the liability of the State's political subdivisions for accidents that occur on the paved shoulder, berm, guardrail, and the Counties duty to provide a suitable

guardrail at wash banks that meet public highways.

Coincidentally it mooted the Petitioners' statutory legal predicate for the appellate review by Ohio Supreme Court, by removing their legal issues that were of great interest and public importance. The Supreme Court declined jurisdiction. Its memorandum order is found at pg. A2.

Thereafter, Petitioners at its earliest opportunity filed with that Court a motion for reconsideration that for the first time raised the issues, at A126, that the State had violated the doctrine of separation of powers, the equal protection and due process issues of the U.S. Fourteenth Amendment, and § 16, Article I of the State's Constitution. The Supreme Court of Ohio denied the motion in its 1/29/97 order A1.

Respondent, Nino Cavaliere, was operating his Chevy van in the lane next to the shoulder proceeding in an easterly direction on interstate highway I-70 in Ohio when his vehicle went straight as an arrow from the curb lane of I-70 to paved shoulder, onto the turndown end, and straight behind and along side the bridge approach guardrail, where it launched off the bridge's wingwall 15 feet down into the creek below. Three passengers died two survived with injury.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. The Ohio Supreme Court and the Ohio Court of Appeals, Tenth Appellate District decided and created Fourteenth Amendment Federal, and Section 16, Article I, State constitutional due process and equal protection questions that have not been, but should be decided by this Court, because the State of Ohio has embarked on a policy of misuse of state governmental powers by reimposing through legislative and judicial action, utilizing both sovereign immunity case and statutory law that was abolished by Section 16, Article I of the Ohio Constitution'

Bill of Rights, judicial decree, and by the State statutorily consenting in Ohio R.C. § 2743.02(A)(1), to have its liablity to Petitioners adjudicated in its Court of Claims in accordance with the rules of law applicable to suits between private parties, and arbitrarily adjudicated Petitioners' wrongful deaths and survivors claims utilizing sovereign immunity law as a legal basis by granting summary judgments in favor of the State Respondents, depriving Petitioners of the applicable substantive state law that is constitutionally protected from sovereign immunity.

Only this Court can vindicate Petitioners' deprivation of their state constitutional rights committed by the State that has embarked upon a course of action to protect itself from liability, by arbitrarily retaining and manipulating sovereign immunity law, abolished by its Constitution, its statutory waiver and, in part, by its judicial decree.

This Court should be committed to do so here, since § 16, Article I and the Fourteenth Amendment are similar.

Justice Stevens in Delaware v Van

Arsdall, 475 US 673, 704, 89 Led2d 674 at pg 699:

> "The emerging preference state constitutional bases of decision in lieu of federal ones is in my view the analytical approach best suited to faciltating the independent role of state constitutions and state courts in our federal system." ""The point is... that a state's constitutional guarantees...were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising tides of federal case law both in method and specfics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the State themselves choose to abandon them and entrust their rights entirely to federal law.""

The State's right to legislate is limited by constitutional limitations. Munn v People of Illinois 94 US 113, 24 L Ed 77 (1877), at p.87:

> "Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations."

Petitioners are constitutionally protected by § 16, Article I, that authorizes suits against the state and limits the Legislature to determine the manner and court where it is to be done in accordance with law. The language employed therein, abolished sovereign immunity. It is plain error for the State while sitting in judgment to defeat Petitioners in a summary proceeding by sovereign immunity legislation.

This constitutional right provides:

"Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

It was found not to be self executing. See the syllabi 1-5, in Krause v State, 31 Ohio St.2d 132, 285 N.E.2d 736, (1972). It was recognized as a viable constitutional right only after the State Legislature, through enabling legislation and its statutory waiver in R.C. § 2743.02(A)(1) created the Ohio Court of

Claims in 1975 that effected a broad waiver of the state's immunity.

In the case of Garret v. Sandusky, 68 Ohio St.3d 139, 624 N.E.2d 704 at pgs. 706-708 (1994), Justice Pfeifer stated after a detailed analysis in his concurring opinion:

"Thus the true intent of the amendment to Section 16, Article I was to abolish sovereign immunity in its entirety."

> **"This true meaning has been ignored by Ohio case law, but should be acknowledged today. Governmental immunity, including municipal immunity, is contrary to the clear meaning and mandate of the Ohio Constitution."**

Sovereign immunity law is not a permissible legislative object under the Ohio Constitution. It was officially acknowledged as judicially abrogated as to political subdivisions by the Ohio Supreme Court in 1982. However, the Ohio Supreme Court has declared that sovereign immunity legislation for political

subdivisions meets the constitutional due process and equal protection rights under both the Fourteenth Amendment and Section 16, Article I. See Fabrey v McDonald Police Department, 70 Ohio St.3d 351, 639 N.E.2d 31 (1994), Syllabus 1-3.

Analysis of O.R.C. § 2743.02(A)(1), reveals that the State of Ohio by law agreed to have its liability determined in its Court of Claims in accordance with the rules of law applicable to suits between private parties.

Private parties do not have the right to access sovereign immunity law as a legal basis for adjudicating their disputes nor to escape liability from a nondelegable duty. See Albain v Flower Hospital, 50 Ohio St.3d 251, 553 N.E.2d 1038 at pg.1047, 3 ALR5th 1006 at pgs. 1019-20,(1990), stating that among the duties considered non-delegable is the duty of a municipality to keep its

streets in repair. This is true for ODOT.

The State, litigating as a private party in its Court of Claims, has a nondelegable duty to maintain the public highways. The liability arising therefrom, remains though it delegated its duty and liabilty to political subdivisions. The State created duties and liability in its subdivisions with respect to the public highways with sovereign immunity laws applicable to them. The State, itself, is liable for breach of those duties. It cannot lawfully shield itself because § 16, Article I does not sanction it; and because the State's waiver of sovereign immunity calls for law as between private parties to determine liability. The apparent distinction of being able to sue political subdivisions in the Common Pleas Courts with a right to a jury trial is extinguished by venue statute R.C. §

2743.03(E)(1) that allows political subdivision defendants to make the State agency, ODOT, a third party defendant and by operation of law cause the transfer a plaintiff's case from the Common Pleas Court to the Court of Claims as occurred in Petitioners' case. See Newton v. Court of Claims, 73 Ohio St.3d 553 at pg. 556, 653 N.E.2d 366 (1995) holding that,

"The Court of Claims is not required to remand a case upon finding that the state is no longer a party."

Consequently, when the State delegates to its political subdivisions the mandamusable ministerial duty to keep the public highways and public grounds in their political subdivision open, in repair and free from nuisance. Liablity under R.C. § 2744.02(B)(3) attaches to both the State and its political subdivisions in its Court of Claims.

The grant of statutory authority to these subdivisions to repair and improve

any public highway or roadway in their jurisdiction under Ohio R.C. § 5535.15 does not excuse the State. After a reasonable time and opportunity, if they fail to do so, neither they nor the State should be exonerated from liability on a sovereign immunity basis **while litigating** in its Court of Claims, in its Appellate Courts or by its State Legislature.

The statutory scheme here is just that, a scheme. It is configured to violate the Petitioners' (and those similarly situated), state constitutional rights to sue the State and to bypass the rules of law of liability applicable to suits between private parties. Litigating in accordance with laws applicable to private parties the State is liable for its own torts. Here it designed, created, installed and maintained by ODOT and its political subdivisions on I-70 for more than 20 years an unsuitable nuisance

bridge approach guardrail. The State cleverly delegated its non-delegable duty. The State has unconstitutionally thus far, successfully used sovereign immunity defenses as a shield for its own liability.

II. The affirmance by the Appellate Court of the Court of Claims' summary judgment, when the trial judge had adjudicated the contested material facts of Petitioners' experts to reach the decision that the accident site guardrail was not a nuisance as a matter law, wherein the Court ignored the rules of law applicable to suits between private parties articulated in the leading case of Taylor v Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724, (1944) deprived Petitioners of their constitutional substantive and procedural due process rights protected both by the entire Section 16, Article I of the Ohio Constitution and the Federal Fourteenth Amendment that can only be vindicated in this Court.

The State of Ohio has by its statutory delegation of its highway common law duties made the political subdivision Respondents by substantive law, liable to Petitioners for the

accident site guardrail under Ohio R.C. § 2744.02(B)(3) and Ohio R.C. § 5535.15, for failure to keep the public highways and public grounds in their political subdivisions "open, in repair and free from nuisance". Their liability extended

> **"to the conditions of the right-of-way that directly affect the highway's safety for the regular and ordinary course of traffic".**

See Mfrs. Natl. Bank v Erie Cty. Road Comm. 63 Ohio St3d. 318, 587 N.E2d 819 at 823, (1992).

Ohio R.C. §§ 5591.36 & 5591.37, required that the county commissioners:

> **"protect by suitable guardrails all perpendicular wash banks more than eight feet in height where such banks have an immediate connection with a public highway other than state highways or are adjacent thereto in an unprotected condition",**

Under R.C. § § 5535.15, they had the statutory authority plus a reasonable time to fix the accident site bridge approach guardrail that was on the paved

shoulder of Interstate Highway I-70. Their breach was a joint and concurrent proximate cause of Petitioners' wrongful deaths and personal injuries. Adkins v Village of Ontario, infra, precluded summary judgment as a matter of law under these circumstances.

The Courts below deprived Petitioners'of their substantive and procedural due processs and equal protection of laws rights under both the Fourteen and Fifth Amendment and § 16, Article I of the Ohio Constitution.

Because photographs, established the guardrail, in part on the paved shoulder of the roadway where it was connected to the bridge, Petitioners had good cause to believe that together with other issues of great public importance that they had raised, that the Ohio Supreme Court would grant Petitioners Memorandum of Jurisdiction because of its

decision in the Adkins v Village of Ontario, 8 Ohio St.3d 45, 457 N.E.2d 317 at pgs. 319, 320, (1983) that stated:

> **"Instead, we find that it is a question of fact for the jury to determine whether the guardrail was located close enough to the highway to impose a duty under the statute.**
>
> **Another question that cannot be properly determined by summary judgment is whether the condition of the guardrail constituted a nuisance."**

In Strunk v Dayton Power & Light Co., 6 Ohio St.3d 429, 431, 453 N.E.2d 604,(1983), the Court acknowledged that a municipality's duty and liability extended to the portion of the highway considered the berm or shoulder.

The Court of Claims and the Court of Appeals held that the accident site guardrail was not a nuisance as a matter of law and no duty was owed Petitioners.

Petitioners were denied the opportunity to have a fair and impartial hearing on their Memorandum in Support of Jurisdiction because in October of 1996

effective 1/27/97 the Ohio State Legislature repealed the law of nuisance as it applied to political subdivisions and removed their liability for the paved shoulder, berm and guardrail portions of the road. It also removed the duty of Counties to provide a suitable guardrail at wash banks at public highways.

The State Legislature's enactment of Amended Substitute House Bill No. 350 altering its statutory liability to Petitioners, violates their due process and equal protection, since it is contemporaneously judging its own liability while changing the rules that determine it, when it is legally bound to having its liability determined in the Court of Claims in accordance with the rules of law applicable to suits between private parties. This type of due process is irrationally absurd and arbitrary.

The State specifically exploited

soverign immunity defenses by repealing every issue of statutory liability that Petitioners had relied upon in their filed Memorandum of Jurisdiction for Ohio Supreme Court review, under its grant of appellate jurisdiction. Ohio Const. § 2, Article IV(B)(2)(d), requires the case to be of public or great general interest in order to sustain jurisdiction. The Ohio Supreme Court was compelled to take judicial notice of the Amended Substitute House Bill No. 350's passage to make a good faith determination of its jurisdiction. Though it is in violation of the separation of powers doctrine, the Ohio Supreme Court was compelled to decline to review Petitioners' mooted issues for lack of its appellate jurisdiction, depriving Petitioners of a fair and impartial due process hearing in that Court under the 14th Amendment.

Usery v. Turner Elkhorn Mining Co.,

428 US 1 at pg. 17, 49 L Ed2d 752 at pg 767, 96 S Ct 2882 (1976), states:

> **"The retrospective aspects as well as the prospective aspects must meet the test of due process, and the justification of the latter may not suffice for the former."**

In the case of Federal Deposit Insurance Corporation v Meyer, 510 US___ 127 L Ed2d 308, 114 S Ct 996 (1994), this Court recognized the significance of the "private-person" element as a controlling aspect of tort law, noting that that the Court is hesitant to engraft language from the private-person element of § 1346(b) onto the sue-and-be-sued clause because the tort liability arising under the Constitution generally does not apply to private entities.

In the Petitioners' case, the sovereign state of Ohio specifically adopted the statute, Ohio R.C. § 2743.02(A)(1), that its liability is to be determined by the rules of law

applicable to suits between private parties. Rules of law of sovereign immunity are not applicable to those type of suits.

III. The State of Ohio's reservation and retention of the right to control the outcome of litigation of its liability and the liability of the State Respondents in its Court of Claims by legislative acts, contravenes Section 16, Article I of the Ohio Constitution because it usurps the limited power granted the Legislature to direct the court and manner the state may be sued, in that it permits the state to maintain sovereign immunity over its liability in the Court of Claims through inter alia., by violating the doctrine of separation of powers, an ultra vires act that contravens the State's statutory waiver contained in Ohio R.C. § 2743.02(A)(1), that constitutes a Federal Fifth Amendment taking by the States of Petitioners' wrongful death and survival actions against the State Respondents without just compensation and a deprivation of their State and Federal substantive and procedural due process and equal protection of the laws rights, under the Federal Fourteenth Amendment and State's Section 16, Article I Bill of Rights.

The Respondent, Ohio Department of Transportation was liable under Ohio

common law for its failure to afford the Petitioners a safe means for travel on Interstate Highway I-70 in accordance with the purpose it was designed and built. That liability "extends to conditions in the right-of-way that directly affect the highway's safety for the regular and ordinary course of traffic" when ODOT built a man made wash bank, contrary to Ohio's public policy stated in Ohio R.C. § 5591.36.

ODOT then utilizing an unsafe and obsolete design, installed an unsuitable bridge approach guardrail at the accident site that did not correspond to its official standard construction drawings adopted by ODOT before the approval of the construction plans or to the one installed at the same time at an adjacent bridge on I-70 that had incorporated those official plans. It made no effort to modify it for more than 20 years.

It was one of the joint and concurrent proximate causes of the wrongful deaths and personal injuries Petitioners sustained, there being no evidence other than the doctrine of res ipsa loquitur to establish driver negligence. It was a denial of substantive and procedural due process and equal protection of laws under both the Fourteenth Amendment Fifth and Section 16, Article I of the Ohio Constitution.

Thus far, the United States Supreme Court has not decided, but should decide, the Fourteenth Amendment substantive, procedural and equal rights federal question of whether Petitioners' rights under § 16, Article I of the Ohio Constitution Bill of Rights vested common law and statutory rights enabling them to sue the State in the Court of Claims and hold it to the law applicable to private

parties? Whether Petitioners were protected constitutionally by the abolishment of sovereign immunity judicially in Ohio, and from the statutory and judical reimposition of sovereign immunity following the State's waiver? Whether the particular laws that were embodied in Amended Substitute House Bill No. 350 relating to the separation of powers issue deprived the Supreme Court of Ohio of its constitutional juridictional base to grant Petitioners a fair and impartial hearing on their Memorandum in Support of Jurisdiction?

State Respondents failed to perform their mandatory nondiscretionary statutory duty to provided a suitable guardrail. Such failure without legal justification is ipso facto arbitrary for 14th Amendment due process purposes. See Nicoletti v Brown, 740 F. Supp. 1268, (1987).

CONCLUSION

As stated in the dissent of Jones v State Board of Education of Tennessee, 397 U.S. 31 at pg. 34, 25 L. Ed 2d 27 pg 29, 90 S Ct 779, (1970):

> **"The doctrine that a government, state or federal, may not grant a benefit or privilege on conditions requiring the recipient to relinquish his constitutional rights is now well established"(citations omitted).**

Why should Petitioners have to relinquish their the right to win their wrongful death suits against the State Respondents in its Court of Claims by the State unconstitutionally depriving them of the applicable substantive law available to private parties. Petitioners right to sue the State cannot not be conditioned upon the nullification of their constitutional rights under § 16, Article I of the Ohio Constitution.

The State's legislative delegation of its highway maintainence nondelegable

duties to its political subdivisions along with sovereign immunity defenses that are applicable for litigation purposes in the Court of Claims, deprives Petitioners of their § 16, Article I and 14th Amendment due and equal protection rights.

The retainage by the State to statutorily alter the, Respondents', political subdivisions' liability by expanding their sovereign immunity defenses at a critical point in the State's litigation as a party, and its retainage of the case law developed thereunder, functions as an unreasonable means of advancing the State's interest to exonerate itself from its legal liability under the applicable private party rules of law in its Court of Claims.

The law applicable to suits between private parties precludes the

State as a party, to direct the decision of the Ohio Supreme Court in Petitioners case by removing its jurisdiction.

The State's ultra vires action usurped its constitutional authority by sovereign immunity legislation when under the law, it is limited to choosing the court and manner it may be sued in accordance with law. The ultra vires act by the State stands as an unconscionable constitutional tort of both the State and Federal Constitutions.

Respectfully, Petitioners therefore pray that their petition for writs of certiorari be granted.

Dated this 28th day of April 1997.

By: Donald D. Weisberger
Donald D. Weisberger
State Bar No. 0000908
Suite 1401
75 Public Square Building
Cleveland, Ohio 44113
Telephone (216) 621 - 7113
Fax: (216) 621 - 5777
Counsel of Record for Petitioners Kniskerns and Cavalieres

Supreme Court, U.S.
FILED

(2) 961729 APR 28 1997

OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, et al., Petitioners,

-vs-

THE TOWNSHIP OF SOMERFORD ET AL., Respondents,

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, et al., Petitioners,

-vs-

THE STATE OF OHIO, DEPARTMENT OF TRANSPORTATION, AND NINO CAVALIERE Respondents,

---

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS, TENTH APPELLATE DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Donald Weisberger
Ohio Reg. No. 0000908
Suite 1401
75 Public Square Building
Cleveland, Ohio 44113
(216) 621 - 7113
(216) 621 - 5777

Counsel of Record for Petitioners' Kniskerns and Cavalieres

140 pp

TABLE OF CONTENTS OF APPENDIX

OPINION AND JUDGMENT OF THE OHIO COURT OF CLAIMS (August 15, 1995)..A30

OPINION AND JUDGMENT OF THE OHIO COURT OF APPEALS OF FRANKLIN COUNTY (June 28, 1996).....A3

OHIO SUPREME COURT JUDGMENT DECLINING PETITIONERS' MEMORANDUM IN SUPPORT OF JURISDICTION (December 20, 1996)...A2

OHIO SUPREME COURT JUDGMENT DENYING PETITIONERS MOTION TO RECONSIDER MEMORANDUM IN SUPPORT OF JURISDICTION (January 29, 1997).....A1

PETITIONERS AFFIDAVIT EVIDENCE OF THEIR EXPERT MAURICE E. BRONSTAD...A39

PETITIONERS AFFIDAVIT EVIDENCE OF THEIR EXPERT JOSEPH MEYERS.....A51

23 U.S.C. §§ 101.....A94

23 U.S.C. 103.....A104

Ohio R.C. § 2743.02(A)(1).....A63

Ohio R.C. § 2744.02(B)(3).....A77

Ohio R.C. § 2744.03(E)(1).....A81

Ohio R.C. § 5535.15.....A67

Ohio R.C. § 5591.36.....A69,A93

Ohio R.C. § 5591.37 .....A70,A94

Ohio Amended Substitute House Bill No. 350 (Amending the Ohio statutes above)..... A70

Section 16, Article I, Bill of Rights, Ohio Constitution, ...A58

Section 2, Article IV, Ohio Constitution.....A58

Fourteenth Amendment to the U.S. Constitution A60

Fifth Amendment to the U.S. Constitution..... A125

OTHER JURISDICTIONAL MEMORANDA

Petitioners Memorandum in Support of Jurisdiction to Ohio Supreme Court.....A136

Petitioners Motion For Reconsideration to Ohio Supreme Court.....A126

APPENDIX A

James KNISKERN, Administrator, Estate of Cynthia Ann Cavaliere et al.,
Appellants,

v.

The TOWNSHIP of SOMERFORD et al., Defendants-Appellees.
Defendant-Appellees.

The State of Ohio, Ohio Department of Transportation, and Nino Cavaliere,
Defendants-Appellees.

No. 96-1861

The Supreme Court of Ohio

January 29, 1997

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals Nos. 95API091164 & 95API091169)

James KNISKERN, Administrator, Estate of Cynthia Ann Cavaliere et al.,
Appellants,

v.

The TOWNSHIP of SOMERFORD et al., Defendants-Appellees.
Defendant-Appellees.

The State of Ohio, Ohio Department of Transportation, and Nino Cavaliere,
Defendants-Appellees.

No. 96-1861

The Supreme Court of Ohio

December 20, 1996

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the cases and dismisses the appeal as not involving any substantial constitutional question:

COSTS:
Docket Fee, $40.00, paid by Donald Weisberger, Esq.

(Franklin County Court of Appeals Nos. 95API091164 & 95API091169)

James KNISKERN, Administrator, Estate of Cynthia Ann Cavaliere et al.,
Plaintiffs-Appellants,

v.

The TOWNSHIP of SOMERFORD et al., Defendants-Appellees.
Defendant-Appellees.

James KNISKERN, Administrator, Estate of Cynthia Ann Cavaliere et al.,
Plaintiffs-Appellants,

v.

The State of Ohio, Ohio Department of Transportation, and Nino Cavaliere,
Defendants-Appellees.

No. 95API09-1164,
(REGULAR CALENDAR)

No. 95API09-1169.
(REGULAR CALENDAR)

Court of Appeals of Ohio,
Tenth Appellate District

Rendered on June 28, 1996

APPEAL from the Court of Claims of Ohio.

PETREE, P.J.

Plaintiffs, Guy, Maria and Joanna Cavaliere, Allstate Insurance Company and James Kniskern, Administrator of the Estates of Cynthia Ann Cavaliere,

Jennifer Kniskern and Felina Cavaliere, appeal from a judgment of the Court of Claims of Ohio in favor of defendants, Ohio Department of Transportation, Madison County Board of Commissioners, Township of Somerford and Western Reserve Mutual Casualty Co. Plaintiffs set forth the following assignment of error:

"I. The trial court erred prejudicially, in granting the separate summary judgment motions of the Ohio Department of Transportation (ODOT), the County of Madison, the Township of Somerford, and the Western Reserve Mutual Casualty Insurance Co. (WRMC) and remanding the case back to Cuyahoga County Common Pleas Court, contrary to law, inter alia, by usurping the function of the trier of fact and denying plaintiffs their due process right to a trial of their case on the merits.

"A. The trial court erred prejudicially, in finding the driver the sole proximate cause of the accident, and that ODOT had immunity, when plaintiffs' expert uncontradicted affidavits and deposition evidence established--that had the Deer Creek accident guardrail been built in accordance with the official standard design drawings adopted by ODOT prior to the project's approval, and/or in accordance with ODOT's manifest overt guardrail design standard, as evidenced by ODOT's nearby guardrail it built at

Beaver Creek in the same time frame--the driver having driven into the accident guardrail would have been redirected onto the paved portion of the roadway without serious injury--instead of onto the guardrail, and off the bridge's wing wall and ODOT's man made wash bank, where his van crashed into the far embankment of Deer Creek, resulting in multiple deaths and serious injuries to the passengers and driver.

"B. The trial court erred prejudicially, in making its summary judgment rulings, by misapprehending and wrongfully finding material and relevant parts of the affidavits of plaintiffs' expert, a nonparty, repudiated--when the court improperly weighed his deposition testimony on cross examination against that expert's affidavits--when that issue is reserved for the trier of fact, and goes to the weight of plaintiffs' expert's testimony, not its substance.

"C. The trial court erred prejudicially, when ruling upon all of the summary judgment motions, in failing to find, that the evidence submitted by all the defendants, failed to rebut plaintiffs' evidence and inference of negligence under the evidentiary rule of 'res ipsa loquitur ' applicable to both the driver, Nino Cavaliere, and the other named joint tortfeasors to whom the doctrine applies because of their nondelegable duty--namely, that the accident was proximately caused by defendants breaching their legal duty to keep Interstate Highway I-70 at the accident site, reasonably safe and free from nuisance for the motoring public, including the plaintiffs, thereby

foreclosing defendants right to their summary judgments.

"D. The trial court erred prejudicially in failing to find that plaintiffs' admissible evidentiary materials were legally sufficient to create genuine issues of material fact requiring a trial on the merits and a denial of the summary judgment motions.

"E. The trial court erred prejudicially, by granting defendants summary judgment on the issues of nuisance and absolute nuisance, created and maintained for years by ODOT at the accident site, with a conscious disregard for the rights and safety of other persons, that had a great probability of causing substantial harm, when those evidentiary materials were before the court and substantiated plaintiffs' claims on these issues, entitling plaintiffs to a trial on the merits.

"F. The trial court erred prejudicially in failing to find, that the definition of 'roadway' as interpreted by Ohio law includes the wing wall of the bridge abutment especially in regard to Ohio's interstate system of highways, such as I-70, at the accident site, and includes the definition of 'highway' inter alia, rights-of-way, bridges, guardrails and protective structures (e.g. clear zone) as defined in 23 U.S.C.A. § 103 & § 101 referenced in R.C. 5516.01--and that ODOT failed over a substantial period of time, in its duty to keep it reasonably safe for the motoring public including plaintiffs; and to which Madison County and Somerford Township each, also have failed, in both

their statutory duty of keeping the I-70 Highway accident site in their political subdivision, as defined herein, free from nuisance, and failed in their statutory duty/authority to seek the approval of ODOT when they had a reasonable opportunity to do so.

"G. The trial court erred prejudicially, in failing to find that the Probate Court of Trumbull County has limited jurisdiction to adjudicate and declare entitlement to wrongful death proceeds of a liability insurance policy in an interpleader/declaratory judgment action, and has no general jurisdiction to adjudicate rights and liabilities of both the living injured and dead insureds, under the under-insured motorist, medical and accidental death coverages of that policy that were not in issue before that court--and consequently, the doctrine of res judicata is inapplicable as a basis for summary judgment in favor of Western Reserve Mutual Casualty Co."

On July 13, 1992, a vehicle operated by Nino Cavaliere left the paved portion of the roadway on Interstate 70 in Somerford Township, Madison County, Ohio, and crashed into an embankment alongside Deer Creek. Three of the five passengers in the vehicle, Cynthia Cavaliere, Jennifer Kniskern and Felina

Cavaliere were killed; Nino Cavaliere and the other two passengers, Joanna and Maria Cavaliere, sustained personal injuries. While in the hospital recovering from his injuries Nino Cavaliere reportedly told police that he fell asleep at the wheel.

Several legal actions arose out of this accident. On February 2, 1993, proceedings were brought in the Trumbull County Probate Court to settle the estates of Felina and Cynthia Cavaliere. On March 1, 1993, defendant Western Reserve Mutual Insurance Company ("Western Reserve") filed an interpleader action in that case seeking the resolution of conflicting claims made upon proceeds of an insurance policy held by the company for its insured Nino Cavaliere. On October 25, 1995, the Trumbull County Probate Court issued an

order limiting Western Reserve's liability under the Cavaliere policy to $100,000. No appeal was taken from the order of the Trumbull County Probate Court.

Two other actions arising out of the accident were filed in the Cuyahoga County Court of Common Pleas, and a third was filed in the Court of Claims of Ohio. Ultimately, the Cuyahoga County actions were removed to the Court of Claims; thereafter, the case proceeded in the Court of Claims as two separate, but related actions.

A motion for summary judgment was filed by each of the defendants. The Court of Claims granted the motions for summary judgment in two separate decisions issued August 15, 1995; judgment entries were also issued on August 15, 1995. Plaintiffs appeal to this court from the judgments of the

Court of Claims of Ohio.

The crux of plaintiffs' assignment of error designated as "I-A" through "I-F," is that the Court of Claims erred when it granted summary judgment in favor of defendants. Accordingly, we will consider the portion of plaintiffs' assignment of error designated as "I-A" through "I-F" jointly.

Under Civ.R. 56, summary judgment is proper when: (1) no genuine issues as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reason-able minds can come to but one conclusion, and viewing the evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Welco Industries, Inc. v. Applied Cos. (1993), 67 Ohio St.3d 344;

Leibreich v. A.J. Refrigeration, Inc. (1993), 67 Ohio St.3d 266.

Plaintiffs' claims against the Ohio Department of Transportation ("ODOT") are based on the theory that ODOT negligently designed the guardrail alongside Interstate 70 at the Deer Creek Bridge. More specifically, plaintiffs claim that the guardrail was defective in that it did not connect to the bridge abutment, it was not long enough and it did not incorporate a "flared end treatment" with an eighteen-foot set-back.

It has been held that ODOT has a general duty to maintain its highways in a reasonably safe condition. Knickel v. Dept. of Transportation (1976), 49 Ohio App.2d 335. However, ODOT is not an insurer of the safety of its highway. See Rhodus v. Ohio Dept. of Transp. (1990), 67 Ohio App.3d 723. In order for plaintiffs to prevail under a theory of

negligence, they must establish that ODOT owed them a duty of care, that ODOT breached that duty, and that plaintiffs suffered damages as a proximate result thereof. **Strother v. Hutchinson** (1981), 67 Ohio St.2d 282.

With respect to plaintiffs' contention that the guardrail was defective because it did not attach to the bridge, plaintiffs' expert admitted in his deposition testimony that this particular defect was not the proximate cause of the accident. Consequently, plaintiffs cannot possibly prevail upon this theory of a defect.

Similarly, with respect to plaintiffs' claim that the guardrail was too short, plaintiffs' expert acknowledged that his opinion regarding this specific defect was based on engineering standards which were not promulgated until after the project was completed. We agree with

the Court of Claims that ODOT has no duty to upgrade a previously constructed guardrail as technology develops. See Bowman v. Ohio Dept. of Transp. (Aug. 30, 1984), Franklin App. No. 83AP-516, unreported (1984 Opinions 2199). Consequently, plaintiffs cannot possibly prevail upon this theory of a defect.

Finally, with regard to plaintiffs' claim that the guardrail constructed at the Deer Creek Bridge should have incorporated a flared end treatment with an eighteen foot set-back, plaintiffs' expert conceded that this particular design feature was not incorporated into ODOT regulations until February 15, 1968, after the original plans were drafted and just months before construction was to begin. Plaintiffs' expert acknowledged that the original plans for the project, including the design of the guardrail, complied with ODOT regulations in effect

at the time the project plans were drawn up.

Nevertheless, plaintiffs' expert opined that ODOT was negligent for failing to incorporate the more advanced design when it constructed the guardrail. Plaintiffs also produced evidence that the project plans which were ultimately followed in constructing of the Deer Creek Bridge project included some new design features called for in the standards promulgated on February 15, 1968. Plaintiffs contend that this evidence supports the opinion of their expert. Plaintiffs also produced evidence that a similar project in the area of Blacklick Creek contained a guardrail with a more advanced design.

In Garland v. Ohio Dept. of Transp. (1990), 48 Ohio St.3d 10, the Supreme Court of Ohio noted that the waiver of immunity under R.C. Chapter 2743 is not

absolute. Id. at 11. The court held that immunity was preserved for those acts or omissions constituting an executive or planning function, involving the making of a basic policy decision, and requiring a high degree of official judgment or discretion. Id. at 13. In Garland, supra, the court held that ODOT's decision as to which type of traffic control device to install at a particular intersection was the type of discretionary decision which deserved the protection of sovereign immunity. Id.

In this case, we hold that ODOT's decision not to redraft its plans to incorporate a new guardrail design was the type of discretionary decision which was entitled to the protection of sovereign immunity. In our view, the fact that ODOT chose to incorporate some changes set forth in the new standards, but not others, proves that ODOT

engineers were exercising their independent judgment in modifying the project plans in the months prior to construction. Indeed, plaintiffs' expert testified that it was ODOT engineers who had to make the decision whether to incorporate later adopted standards into the project plans. Similarly, the fact that the new design standards were incorporated into the Blacklick Creek project establishes only that ODOT followed its current standards in designing and constructing a later project. As stated above, there is no question that the new design standards were not in effect when the Deer Creek Bridge was originally designed.

In the final analysis, even if we were to agree with plaintiffs that ODOT made a poor decision when it failed to incorporate the new design into the project plans at the Deer Creek Bridge,

ODOT is protected from liability arising from this decision under the doctrine of sovereign immunity. Garland, supra. Consequently, the Court of Claims did not err when it granted summary judgment in favor of ODOT.

Plaintiffs' claims against Madison County and Somerford Township are predicated upon the theory that the guardrail constructed at the Deer Creek Bridge was a "nuisance." R.C. 2744.02(B)(3) provides:

> "Political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance, except that it is a full defense to such liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge."

Plaintiffs argue that the county and/or township should have reconstructed the guardrail to conform to current design standards; that the failure to do so resulted in a nuisance. The Court of Claims determined that because the guardrail was not a condition upon the roadway, it could not be considered a nuisance as a matter of law, even if it were negligently designed. In so holding, the Court of Claims relied on this court's decision in Harris v. Ohio Dept. of Transp. (1992), 83 Ohio App.3d 125; wherein, this court held that the existence of an allegedly hazardous embankment near the median strip of a state highway could not be considered a nuisance, as a matter of law, since it was not a condition in the right-of-way which directly jeopardizes the safety of the usual and ordinary traffic on the roadway. Id. at 130.

In Gonzalez v. City of Cuyahoga Falls (Nov. 13, 1993), Summit App. No. 15891, unreported, the Summit County Court of Appeals applied Harris, supra, in a case involving an automobile accident allegedly caused by a design defect in a guardrail. Ironically, the plaintiff in the Gonzalez case claimed that the flared end treatment incorporated in the design of the guardrail was defective in that it permitted the vehicle in which plaintiff was traveling to become impaled, causing her to suffer a serious injury. The court specifically held that a guardrail on the berm of a highway was not a nuisance under R.C. 2744.02, because it was not on the regularly travelled portion of the road, and did not directly affect the highway safety for the regular and ordinary course of traffic.

In this case, there is no doubt that the guardrail was located outside the

regularly travelled portion of the road and that it did not affect the safety of the highway for regular and ordinary course of traffic. As stated above, the guardrail was originally designed in accordance with ODOT regulations and was constructed in accordance with its design. Moreover, there is no evidence that the guardrail had fallen into a state of disrepair. Thus, applying Harris and Gonzalez herein, and given the nature of the alleged defect in the guardrail, we hold that the guardrail was not a nuisance under R.C. 2744.02(B)(3), as a matter of law.

Plaintiffs next contend that the Court of Claims erred by refusing to apply the doctrine of res ipsa loquitur to impose liability upon defendants. The doctrine of res ipsa loquitur is not a theory of tort liability; rather, it is the doctrine of evidence which permits a

plaintiff to prove negligence circumstantially upon a showing that the instrumentality which caused the harm was in the exclusive control of the defendant and that the event which caused the harm was not the type of event which would normally occur in the absence of defendant's negligence. Wiley v. Gibson (1990), 70 Ohio App.3d 463, 465. Even if it could be inferred that either the township or the county had exclusive control of the guardrail, liability cannot be imposed upon either defendant under the doctrine of res ipsa loquitur, since they had no control over the Cavaliere vehicle. Accordingly, the Court of Claims did not err when it refused to apply the doctrine of res ipsa loquitur herein.

Finally, to the extent that plaintiffs contend that liability may be imposed upon Madison County and/or Somerford

Township under various other sections of the Revised Code, we note that R.C. 2744.02(B)(5) provides:

> "In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed upon the political sub-division by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of general authorization that a political sub-division may sue and be sued." (Emphasis added.)

Although plaintiffs claim that other sections of the Revised Code place a duty upon the county and/or township to reconstruct the Deer Creek Bridge, plaintiffs have not identified any section of the Revised Code which even

arguably imposes "liability" upon either the county or township for harm caused by an allegedly defective guardrail constructed and maintained by ODOT. Thus, there is no legal basis for imposing liability upon either of these defendants under any other section of the Revised Code. See R.C. 2744.02(B)(5).

In short, the Court of Claims did not err by granting summary judgment in favor of defendants. The portion of plaintiffs' assignment of error designated as "I-A through I-F" is overruled.

In the portion of plaintiffs' assignment of error designated as "I-G," plaintiffs contend that the Court of Claims erred when it determined that the prior judgment of the Trumbull County Probate Court effectively limited Western Reserve's liability to $100,000. Under the doctrine of res judicata, a judgment

or decree of a court possessing competent jurisdiction shall be final as to the subject matter thereby determined. See National Amusements, Inc. v. Springdale (1990), 53 Ohio St.3d 60, 62; Rogers v. Whitehall (1986), 25 Ohio St.3d 67, 69. Res judicata operates to prevent repeated attacks on a final judgment and applies not only to what was determined but, also, to every question which might properly have been litigated. State ex. rel. White v. Franklin Cty. Bd. of Elections (1992), 65 Ohio St.3d 45. On October 25, 1995, the Trumbull County Probate Court issued the following order:

> "It is further ORDERED that upon deposit of the $100,000.00 with this Court, Western Reserve Mutual Casualty Company's obligation to defend and indemnify Nino Cavaliere under the Policy shall be deemed satisfied in full and that it be released and discharged from any and all further obligations under the Policy, including without

limitation liability for any damages or claims asserted or which could be asserted by any and all of the named Defendants, their personal representatives or uardians or their subrogees."

Plaintiffs contend that res judicata does not apply herein, because the probate court did not have subject matter jurisdiction to determine Western Reserve's total liability under the policy. We disagree.

R.C. 2101.24(C), states:

"The probate court has plenary power at law and in equity to dispose full of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code."

Additionally, R.C. 2125.02(C), provides:

"A personal representative appointed in this state, with the consent of the court making the appointment and at any time before or after the commencement of an action for wrongful death, may settle with the defendant the amount to be

paid."

In conjunction with this interpleader action, Western Reserve surrendered what it claimed were the policy limits of Nino Cavaliere's auto insurance policy in an effort to settle the claims against the policy. In making the determination whether the settlement was fair and equitable, the probate court was required to determine the limits of liability under the policy. See Burris v. Grange Mut. Cos. (1989), 46 Ohio St.3d 84, 94 (reversed on other grounds by Savoie v. Grange Mut. Ins. Co. [1993], 67 Ohio St.3d 500). Thus, the Trumbull County Probate Court order limiting Western Reserve's liability under the policy was a valid exercise of that court's subject matter jurisdiction.

The language of the Trumbull County Probate Court order is clearly broad enough to encompass plaintiffs' claims

against Nino Cavaliere's auto insurance policy with Western Reserve. Accordingly, to the extent that plaintiffs present action seeks to make a further claim upon the policy, that action is barred by the doctrine of res judicata. The portion of plaintiffs' assignment of error designated as "I-G" is overruled.

Having overruled all parts of plaintiffs' assignment of error, we hereby affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

DESHLER and REILLY, JJ., concur.

REILLY, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

James KNISKERN,
Administrator, Estate of Cynthia Ann Cavaliere et al.,
Plaintiffs-Appellants,

v.

The TOWNSHIP of SOMERFORD et al., Defendants-Appellees.
Defendant-Appellees.

James KNISKERN, Administrator, Estate of Cynthia Ann Cavaliere et al.,
Plaintiffs-Appellants,

v.

The State of Ohio, Ohio Department of Transportation, and Nino Cavaliere,
Defendants-Appellees.

No. 95API09-1164,
(REGULAR CALENDAR)

No. 95API09-1169.
(REGULAR CALENDAR)

Court of Appeals of Ohio,
Tenth Appellate District

Rendered on June 28, 1996

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on June 28, 1996 plaintiffs' assignment of error is overruled, and it is the judgment and order of this court that the judgment of

the Court of Claims of Ohio is affirmed.

PETREE, P.J., DESHLER and REILLY, JJ.

(signature)
By Charles R. Petree, Presiding Judge

REILLY, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

James Kniskern et al.
Plaintiffs

v.

Township of Somerford,
et al.
Defendants

and

Madison County Board of
Commissioners

Defendant/Third-Party
Plaintiff

v.

Department of Transportation

Third-Party Defendant

Case No. 95-02901-PR

IN THE COURT OF CLAIMS OF OHIO

August 15, 1995

Pursuant to this court's June 28, 1995, order, the respective motions for summary judgment of defendants, Western Reserve Casualty Company (Western Reserve), The Township of Somerford and its Trustees (Somerford Township), and Madison County Board of Commissioners (Madison County), are now properly before this court for determination. Likewise, plaintiffs' various filings contra to each of the defendants' motions are now properly before the

court.

Civ. R. 56)C) states, in part, as follows:

> ***Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *** A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. ***

See, also, **Williams v. First United Church of Christ** (1974), 37 Ohio St. 2d 150; **Temple v. Wean United, Inc.** (1977), 50 Ohio St. 2d 317.

Implicit in this rule is that in order for this court to grant summary judgment, it must conclude, after reviewing the limited evidentiary materials permitted by Civ. R. 56)C), that there are no genuine issues of material fact; that the moving party is entitled to judgment as a matter of law;

and that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. **Harless v. Willis Day Warehousing** (1978), 54 Ohio St. 2d 64, at 66. Upon review of the limited materials permitted by Civ. R. 56(C) and submitted to the court and, after conducting a non-oral hearing, the court renders the following decision.

Shortly after 11:30 p.m. on June 12, 1993, Nino Cavaliere (Cavaliere) finished his work shift at Packard Electric Company and returned to his home in Warren, Ohio. At approximately 12:00 a.m. on June 13, 1993, Cavaliere went to bed and then awoke at 4:00 a.m., so that he could begin his trip to the Wright State University Medical School in Dayton, Ohio, to attend his brother's graduation ceremony. Cavaliere first drove his 1990 Chevrolet van to Chardon, Ohio, to pick up his sister-in-law, Cynthia Cavaliere, her sister, Jennifer Kniskern, and Cynthia's three children, Felina, Maria, and Joanna Cavaliere. At approximately 5:30 a.m., the group left Chardon. Cynthia drove most of the way to Dayton while Cavaliere attempted to sleep.

The graduation ceremony began at 12:00 p.m. and lasted until 1:30 p.m. After the ceremony, Cavaliere and his family ate at a local restaurant before beginning the return trip to Warren, Ohio. Cavaliere drove the van on the way home. Cynthia rode in the front passenger seat and Felina, Maria and Joanna Cavaliere were seated in the rear of the vehicle along with Jennifer

Kniskern. En route to Warren, Cavaliere drove eastbound on Interstate 70 (I-70). At approximately 4:30 p.m., in Madison County, Somerford Township, Ohio, near milepost 72, Cavaliere either fell asleep or otherwise lost control of his van. The van proceeded off the traveled portion of I-70 across a ten-foot shoulder on the south side of the roadway, and through the right-hand berm. The van's left front tire scraped the end of the right-hand guardrail. The van continued behind the guardrail and through the grass until it struck a fence and the foundation of the Deer Creek bridge. After colliding with the fence and bridge foundation, the van catapulted into the air and crossed Deer Creek where it became wedged under the Deer Creek bridge. As a result of the accident, Cynthia Cavaliere and Jennifer Kniskern died instantly, Felina Cavaliere died six days later, and Nino, Joanna and Maria Cavaliere sustained personal injuries.

At the time of the accident, Cavaliere's vehicle was insured by Western Reserve Casualty Company. The liability limits of Cavaliere's policy were $50,000 per person and $100,000 per accident. In addition, the policy also provided for uninsured/underinsured motorists coverage in the amount of $50,000 per person and $100,000 per accident. Subsequent to the accident, Western Reserve filed a complaint for interpleader and declaratory relief in the Trumbull County Court of Common Pleas, Probate Division. The probate court ordered Western Reserve to deposit $100,000, the maximum coverage under Cavaliere's policy, with the court. The

probate court further ordered that:

> ***(u)pon deposit of the $100,000.00 with this Court, Western Reserve Mutual Casualty Company's obligation to defend and indemnify Nino Cavalier under the policy shall be deemed satisfied in full and that it be released and discharged from any and all further obligations udner the policy, including without limitation liability for any damages or claims asserted or which could be asserted by any and all of the named defendants, their personal representatives or guardians or their subrogees.

Western Reserve complied with the probate court's order and deposited $100,000 with the court. Accordingly, this court finds Western Reserve's motion for summary judgment is well-taken and that it is entitled to judgment as a matter of law.

The summary judgment motions of defendants, Somerford Township and Madison County, are similar and shall be considered together. Plaintiffs allege that the Ohio Department of Transportation (ODOT) negligently designed and constructed the guardrail at the accident site of the southern side of I-70, near milepost 72, just prior to Deer Creek bridge. They further maintain that the accident site, including the guardrail and the Deer Creek bridge, constituted an absolute or qualified nuisance which proximately caused plaintiffs' injuries and for which Somerford Township and Madison

County are responsible because they failed to abate said nuisance as required by R.C. 2744.02. Somerford Township and Madison County deny any liability to plaintiffs.

I-70 is a state through-highway at the accident location. Accordingly, pursuant to R.C. 5535.02.(a) and 5535.08, ODOT has a duty to maintain I-70. ODOT, however, is not an insurer of the safety of the traveling public on I-70. **Rhodus v. ODOT (1990)**, 67 Ohio App. 3d 723, at 730. Rather, ODOT's duty to maintain I-70 is measured by a reasonableness standard. **Id.** at 729. Neither Somerford Township nor Madison County has entered into any type of agreement with ODOT for the construction, maintenance or repair of the portion of I-70 at the accident scene. Accordingly, neither Somerford Township nor Madison County can be held responsible for any alleged negligent design or construction of the guardrail in question.

Moreover, even if Somerford Township or Madison County were responsible for I-70 at the accident site, the question remains whether the guardrail could be considered a nuisance that Somerford Township or Madison County failed to abate. "Nuisance," defined in this type of context, is a condition within either Somerford Township's or Madison County's control that creates a danger for ordinary traffic on the regularly traveled portion of the road. See, **Harris v. Ohio Dept. of Transp.** (1992), 83 Ohio App. 3d 125, at 129, citing **Manufacturer's National Bank of Detroit v. Erie City Road Comm.** (1992), 63 Ohio

St. 3d 318. In this case, the guardrail shielding Deer Creek and the Deer Creek bridge did not render I-70 unsafe for the usual and ordinary methods of travel along the roadway. In other words, the guardrail did not in any way preclude Cavaliere or the general public from their proper use of I-70. Furthermore, the guardrail did not cause Cavaliere to lose control of his van and did not cause him to leave the traveled portion of I-70, some ninety-eight feet from the turned down end of the guardrail. Therefore, plaintiffs' claim that the guardrail constituted a nuisance is without merit.

For all the foregoing reasons, the respective motions for summary judgment of defendants, Western Reserve, Somerford Township, and Madison County, shall be GRANTED.

(Signature)
FRED J. SHOEMAKER
Judge

James Kniskern et al.
Plaintiffs

v.

Township of Somerford,
et al.
Defendants

and

Madison County Board of
Commissioners

Defendant/Third-Party
Plaintiff

v.

Department of Transportation

Third-Party Defendant

Case No. 95-02901-PR

IN THE COURT OF CLAIMS OF OHIO

August 15, 1995

JUDGMENT ENTRY

Upon consideration of all the evidence and for the reasons set forth in the decision rendered concurrently herewith, the respective motions for summary judgment of defendants, Western Reserve, Somerford Township, and Madison County, are hereby GRANTED. The third-party complaint filed against defendant, ODOT, is hereby rendered moot. Court costs are assessed against plaintiffs.

The clerk is directed to serve notice of this judgment and its date of entry upon the journal to all parties.

Finally, the clerk is directed to return the original papers to the Cuyahoga County Court of Common Pleas.

(Signature)
FRED J. SHOEMAKER
Judge

AFFIDAVIT

STATE OF TEXAS)
) SS
BEXAR COUNTY)

Now comes Maurice E. Brownstad, P.E., the affiant herein, having been first duly sworn according to law and says that he gives this affidavit as support of the Plaintiff's position and in opposition to both the summary judgment motion of the ODOT in Case No. 94-07926 pending in the Court of Claims of Ohio and the summary judgment motion of the Township of Somerford and the County of Madison in Case No. 95-02901-PR also in the Court of Claims of Ohio.

Affiant says that he is a duly licensed professional engineer in the states of Texas and Arizona and has been and is currently engaged in full-time consulting engineering practice throughout the U.S. and in Canada. Affiant is a recognized expert in the area of highway safety and accident reconstruction and has had 27 years of previous consecutive experience in highway safety research and development. Affiant further has testified many times as such an expert on behalf of the State of Ohio in ODOT cases. Affiant attaches his curriculum vitae hereto, and incorporates it by reference as though fully rewritten herein.

Affiant says that he has reviewed material described in Attachment A. Based on affiant's review and analysis of this material, the affiant's expert opinion is expressed in following paragraphs and figures.

1. The Accident. On June 13, 1992 at about 4:30 pm during daylight hours, a 1990 Chevy C-20 van operated by Nino Cavaliere was eastbound (ES) on IH-70 when it went off the right side of the road. The left (LF) scuffed the end of a turndown guardrail before proceeding through a fence and becoming airborne as it crossed Deer Creek and plunged into the embankment on the far side. Figure 1 is from the police report (A.1)* [Numbers in parentheses refer to references cited in Attachments which are part of the affidavit as exhibits but are deleted at this time.] As a result there were three fatalities and one serious injury sustained by the occupants of the van. The driver was also seriously injured.

2. The Roadway. IH-70 in the vicinity of the accident was a 4-lane divided highway with 10-ft paved shoulders on the right. There was a very moderate curve to the right for EB traffic approaching the bridge over Deer Creek. According to the police diagram, the guardrail on the right side of the EB roadway was approximately 12 ft from the lane solid edge stripe and the guardrail end contacted by the vehicle LF was 14'-5" from the solid white edge stripe.

3. Clear Zone. The probability of a vehicle encroaching onto the roadside and striking a fixed object or hazard is dependent on three factors: (1) proximity of the hazard to the traveled way, (2) speed of traffic, and (3) traffic exposure measured by the number

of vehicles that travel by the hazard. Research by K.A. Stonex at General Motors Proving Grounds in the 1950s showed that twenty percent (20%) of motorists that inadvertently leave the traveled way, either to the right or left, will encroach on the unencumbered and traversable roadside beyond 30 feet; conversely, eighty percent (80%) of these motorists will regain control of their vehicles and return to the pavement without incident. For this reason, ODOT, as well as other highway agencies, has purposely designed into freeway highway systems such as IH-70, a 30-foot side clear zone to accommodate in a safe manner eighty percent (80%) of all vehicle roadside encroachments. A hazard such as a fixed object or non-traversable condition (i.e., drop-off into a stream) within the 30-foot clear zone should be shielded with either guardrails, median barriers or crash cushions if it cannot otherwise be safety-treated or removed. Hazards situated closer to the traveled way are more likely to be struck then those located near the extreme edge of the clear zone; the relationship between the hazard offset distance and likelihood of being impacted by an encroaching vehicle was established by Stonex in his 1950s pioneering research.

Clear zones of 30 feet have been recommended for high-speed freeways by the AASHTO since 1967 (B.4). Motorists inadvertently encroach on the roadside with a predictable rate. That is, for every 200,000 cars that travel along a length of highway, a predictable percentage will depart either to the right or left of the highway depending

on vertical and horizontal alignment. A higher number of vehicle passage exposure will produce a higher number of vehicle encroachments. The exposure is determined by multiplying the number of cars per day by the number of days the hazard exists by the length of the hazard.

A revolutionary change in highway safety occurred with the passage of the Highway Safety Act of 1966. The standard of care for the design, construction and maintenance of U.S. highways was elevated from the assumption that highways were designed for perfect drivers who never made mistakes to human drivers who on rare occasions inadvertently left the traveled way and encroached on the roadside. From 1966 highway roadsides were designed to the new "forgiving" roadside standard whenever practical. By providing a "forgiving" roadside free of fixed objects and non-traversable hazards, most motorists who errantly encroached on the roadside would be able to recover control of the vehicle and return to the traveled way without further incident.

After 1968, new high-speed highways, particularly Interstate routes and freeways, were designed with a 30-foot wide "forgiving" roadside, or 30-foot wide clear zone. The 30-foot clear zone dimension was based on scientific research that showed 80 percent of motorists inadvertently encroaching on the roadside would recover without incident and return to the pavement.

It was recognized by highway

engineers that most of the highways designed and constructed before 1966 did not have a roadside with a 30-foot wide clear recovery area. Instead of delaying the introduction of this new standard of care into the highway system, particularly on major highway systems, the U.S. Bureau of Public Roads (now the Federal Highway Administration "FHWA") insisted that the Interstate routes be immediately upgraded to reflect the 30-foot wide forgiving roadside. At the same time the American Association of State Highway and Transportation officials adopted the 30-foot wide clear zone for high speed highways and recommended the immediate upgrade of existing highways to this new standard whenever practical.

4. The Accident Guardrail. The guardrail encountered by the accident vehicle was an approach guardrail to the Deer Creek bridge. The original guardrail was a Type 4 as specified on project plans (A.2). There were four guardrail standard drawings included in the 1968 construction drawings:

Drawing No.	Latest Rev Date
GR-1	1-1-67
GR-2B	2-15-68
GR-5B	6-1-65
GR-6	6-1-65

None of these drawings reference a Type 4 guardrail. Ohio Standard Drawing GR-2A (1/1/67) describes a Type 4 guardrail. The accident guardrail was not a Type 4 according to the drawing and photographs. The accident guardrail had a turndown end treatment. None of

these drawings describe a turndown end treatment.

The project plans layout of the right shoulder guardrail and the left median guardrail for EB traffic apparently conform to Standard Construction Drawing (SCD) GR-5B (6/1/65) as shown in Figure 2. The 150-ft long guardrail and 150-ft long barrier rail would correspond to requirements of a median with a width of 84 ft on GR-5B (6-1-65). GR-5B apparently is based on 12'6" post spacing. There is no SCD in contract plans with this post spacing. In addition, it appears that this plan was deleted from the "Standards" on 2-15-68.

5. Turndown Guardrail Ends. The end treatment involved in this accident has never been a crashworthy treatment and is being phased out of high speed highway usage. No turndown end has met crash test criteria and been granted operational status by the FHWA. Limitations of the turndown are described as follows:

> One of the first efforts to eliminate the problem of vehicle impalement on roadside barrier ends was the use of turned-down-barrier ends. These ends very effectively eliminate the impalement problem and when properly detailed, provide needed barrier end anchorage. However, tests have shown that some turned-down-end designs can cause impacting vehicles to vault and roll over. Also, under frequently used layouts turned-down-ends can

capture errant vehicles and guide them into the hazards and barriers were intended to shield. Designers contemplating the use of a turned-down-end should examine the accident experience and potential of a proposed layout. (Ref B.3)

One of the first efforts to eliminate the problem of vehicle impalement on roadside barrier ends was the use of turned-down terminals. In this type of ending, the W-beam rail is reduced from full height to ground level, typically over a distance of 25 feet. The turned-down rail is intended to collapse on impact, allowing an impacting vehicle to pass over the rail without becoming unstable or airborne. This treatment effectively eliminated the impalement problems, and when properly detailed, provided adequate end anchorage. However, subsequent testing and field experience with the original turned-down-designs revealed a tendency for these designs to vault and sometimes roll impacting vehicles.

Research efforts have resulted in several variations of the turned-down terminal, all of which are intended to "weaken" the terminal by reducing the vertical load capacity of the rail-to-post attachments for several posts near the terminal. In the original design, the rail was connected to the posts with standard 5/8" post bolts. Later

designs have substituted weaker post bolts or fastening straps (clips) to hold the rail in position.

Another aspect of this terminal's performance that should be considered by the designer is the possibility that the turned-down rail will capture an impacting vehicle and channel it along the line of guardrail into the area of the hazards. For end-on impacts, after the rail becomes detached, the vehicle will continue to strike posts until it comes to a stop. If the impact speed is high enough, or if the rail-to-post attachment is too strong for the impacting vehicle, the vehicle may still get on top of the rail and eventually roll over of hit the hazard., Flaring a turned-down terminal away from the road-way, as shown in Figure 5.20, reduces the likelihood of its capturing a vehicle or causing a rollover. For angle impacts, if the rail does drop before the front wheels of the vehicle leave the ground,the car is likely to travel a good distance beyond the terminal. Thus, once again, a clear, traversable run-out path is required for maximum effectiveness. (Ref B.5)

The end treatment in this accident allowed the vehicle to ramp up the system, actually steering it parallel to the rail as it proceeded. The modest flare was ineffective and the design

which included intermediate posts between the end and the first full height barrier post was in direct contradiction to the "lay down" design principles of some improved turndown end designs.

The characteristics of turndown described in B.3 and B.5 make longer barriers using turndowns a requirement due to the uncontrolled "riding" along the top of the barrier.

6. Alternative Treatments. An official design drawing by ODOT available for this project was SCD GR-6 dated 2-15-68 as shown in Figure 3.

7. Guardrail Layout Consideration. The purpose of the approach guardrail is to 1) shield the bridge end, 2) shield the creek hazard, and 3) shield a hazardous embankment prior to the creek. I do not have the data to check the last requirement. The purpose of the median guardrail is the same unless the opposing bridge end is within the clear zone.

The accident guardrail and the median guardrail represent a readily apparent inconsistency that provides motorists leaving the left side of the roadway with much longer guardrail protection than the right side as illustrated in Figure 4. Had the layout procedures of GR-6 (2-15-68) been used, a more consistent degree of shielding would have been achieved.

8. Signage. Due to the short guardrail, the use of a turndown end treatment, and the concealed (from the perspective of the van driver) stream drop-off, a warning sign advising motorists of the creek should have been considered. At the very least a stream crossing sign (2X-5, Ref A.8) should have been sued to alert drivers of a continuous lateral hazard behind the guardrail.

9. Conclusions. Based on the preceding discussion the following conclusions are made.

1) The accident guardrail was not built according to the plans of Project I-70-3(25)69. Specifically, the turndown end and the Type 4 guardrail were not described in the project plans.

2) Guardrail layouts for the EB right side and median were totally inconsistent and provided the accident vehicle with an insufficient length of guardrail to screen the creek hazard. This negligence, which could have been averted by use of an available treatment described in GR-6 (2-15-68) allowed the accident vehicle to proceed behind the guardrail and into the creek. Had more consistent and up-to-date drawings been used a minor guardrail impact would have occurred with no probability of serious injury. It is possible that an obsolete drawing (GR-5B, 6-1-65) was used; indications are that this drawing was deleted on 2-15-68 from the Ohio DOH standards.

3) Using layout procedures from NCHRP Report 118, a total guardrail length as described in Figure 5 would have been 240 ft. This length of guardrail would have intercepted the vehicle as shown in Figure 5 and with the shallow impact angle (as evidenced by path of vehicle) containment and redirection of the vehicle would have been assured. Also shown in Figure 5 are layout values obtained using procedures of the 1977 AASHTO Barrier Guide (B.3), and the layout of SCD GR-6i which would have resulted in redirection also.

4) The negligence cited in selection of the RH guardrail layout is based on two observations: (1) a more consistent and effective guardrail layout was available in GR-6 (2-15-68), (2) the RH guardrail was obviously not long enough when comparing it to the length of the median guardrail, and (3) no consideration of vehicle performance on turndown ends.

5) There was apparently no consideration of the limitations of the turndown end in exposing traffic to the hazardous creek.

6) There was apparently no consideration of placing a sign regarding the continuous hazardous creek behind the short guardrail.

7) It is my expert opinion based on reasonable engineering and accident reconstruction probability that the negligence in construction of the guardrail and the departure from the design plans as well as the failure to

follow the approved design plans that were available as described were proximate causes of the accident. But for this negligence the van operated as it was would have struck the guardrail in such a manner as to be redirected onto the paved shoulder of Interstate Highway I-70 and precluded the disaster that occurred.

8) It is further my expert opinion that the guardrail as constructed constituted a nuisance. The premise for the Interstate Highway I-70 incorporated the idea of a clear zone of 30 feet wide which was contemplated by experts as being necessary for safe highway travel and was considered an integral part of the roadway.

9) The proximate cause related to lack of signage regarding the creek hazard is not definite due to the unknown reason for the van leaving the traveled way.

Further Affiant sayeth naught.

Maurice E. Bronstad, P.E. (Signature)
Maurice E. Bronstad, P.E.

SWORN TO AND SUBSCRIBED IN MY PRESENCE THIS 4th day of May 1995.

Jane Baker (Signature)
Notary Public in Bexar County, Texas

AFFIDAVIT

Myers Surveying Company
2740 East Main Street
Bexley, Ohio 4329-2577
(6il4) 235-8677
Telefax 235-4559

State of Ohio)
) SS:
Franklin County)

Now comes Joseph P. Myers, registered engineer and surveyor, duly licensed in accordance with law with the State of Ohio, affiant herein, having been first duly sworn according to law and says that he gives this affidavit as support of the Plaintiffs' position and in opposition to both the summary judgment motion of the Ohio Department of Transportation (O.D.O.T.) in Case No. 94-07926 pending in The Court of Claims of Ohio and the summary judgment motions of The Township of Somerford and The County of Madison in Case No. 95-02901 PR also pending in The Court of Claims of Ohio.

Affiant says that he graduated from Ohio Northern University with a Bachelor of Science in Civil Engineering degree in June of 1983. Affiant says that he successfully completed the Engineer-In-Training examination administered by the State Board of Registration for Professional Engineers and Surveyors also in June of 1983.

Thereafter, affiant was employed full time as a design engineer for bridges and as an inspector thereof with the consulting engineering firm of Sticklen-

Belsheim & Associates of Columbus, Ohio for a period of five (5) years.

Thereafter, affiant in July of 1988 worked full time at Myers Surveying Company from that time to the present. The various duties include performing mortgage, boundary and topographic surveys, site design work, client development, estimating, preparing proposals, and upon becoming a Registered Surveyor with the State of Ohio in February 1991, is a part owner of said Myers Surveying Company.

In September of 1988, affiant became a Registered Engineer with the State of Ohio.

From 1983 to 1988, affiant on weekends and on a part-time basis was employed with said Myers Surveying Company doing principally boundary and mortgage surveys.

Affiant says that he has been retained on April 6, 1995, by the attorney for the plaintiffs to:

a) conduct a topographic survey and inspection of the guardrail of the eastbound lane-southwest area, southwest wing of the abutment and creek bank along the south side of Interstate Highway 70 over Deer Creekand to prepare a drawing of same (fig.1);

b) conduct an inspection, random spot elevations and guardrail measurements of the same areas of the east bound lanes along the south side of Interstate Highway 70 over Beaver Creek,

located approximately 3.6 miles to the west;

c) take photographs of both the Deer Creekand the Beaver Creek locations for review and analysis (D)*;

d) obtain and review copies of portions of the Ohio Department of Transportation (O.D.O.T.) construction plans for both locations and various Standard Construction Drawings (B) of said O.D.O.T.;

e) obtain a certified copy of the deed evidencing title of the real estate from the County Recorder at the above-mentioned sites in the State of Ohio (C);

f) provide an expert opinion based upon my inspection and measurements comparing the eastbound lane-southwest area, southwest wing of the abutment and creek bank along the south side of the Deer Creek site to the same area of the Beaver Creek site;

g) to review portions of the material provided by Donald Weisberger. (A)

*Items in parentheses refer to references cited in Attachment A

All attachments hereto are true and accurate copies of the original and are incorporated herein by reference.

[The attachments referred to have not been included in the appendix]

From my review of the Ohio Department of Transportation drawings of the projects at Deer Creek and Beaver Creek on Interstate 70, and from my visual inspection, surveying measurements,and photographs taken at both Deer Creek and Beaver Creek sites focusing on: a) the clear zone on the south side of the eastbound lane of Interstate 70; b) the guardrail which extends away from the bridges approximately 150 feet at Deer Creek and approximately 175 feet at Beaver Creek (B1 sheet 44, B2 sheet 38); c) the southwest wing of the abutment; d) southwest embankment as it goes into the creek; I make the following finding:

1) Both sets of drawings were approved by the State of Ohio in 1968 (fig.2 & 3)

2) The layout of Interstate 70 is such that a vehicle cannot pass, while driving in the eastbound lanes, the Deer Creek site without first crossing the Beaver Creek site, excluding the use of emergency vehicle cross-over areas.

3) The eastbound Interstate 70 bridge over Deer Creek is a three (3) span continuous reinforced concrete slab with capped pile substructure (B1 sheet 318). The Deer Creek bridge is approximately 93 feet long which is approximately 20 feet longer than the Beaver Creek Bridge. (B2 sheet 193)

4) Beaver Creek guardrail is longer and is curved or flared approximately 20 feet towards the south; Deer Creek guardrail is relatively straight.

5) Neither eastbound approaches to

the sites indicate signs warning the public of the hazards existing at Deer Creek or Beaver Creek stream crossing.

6) Both eastbound bridges are approximately the same height above the creek bed, varying from approximately 13 to 14 feet. (B1 sheet 44, B2 sheet 38)

7) Both eastbound bridges have creek water flowing under the bridge at the time of the inspection.

8) Ohio Department of Transportation construction plans show that Deer Creek has been relocated to flow under the Deer Creek bridge, whereas Beaver Creek remained in the same general area as part of the new improvements. A reconfiguration of the embankment slope occurred as part of the new improvements at both sites. (B1 sheets 190, 191 & 192)

9) The hazard at the Deer Creek site consists in part, of the southwest wing of the abutment that forms part of the bridge itself. Portions of its top surface is flush with the ground which creates a launch ramp. The design plans indicate that it is to be elevated similar to the southwest wing abutment at Beaver Creek. The southwest wing of the abutment at Deer Creek creates a perpendicular bank that extends four feet laterally from the bridge in a southerly direction. It drops approximately four feet at a right angle of 90 degrees from its horizontal surface according to the design plans. The angle of inclination (fig. 6) from the abutment bench where the four foot drop is seated continues on to the creek

bed at an calculated angle of approximately 27 degrees or about a 2 to 1 slope as per the plan. From my surveying measurements, there are portions of the slope at its base in the clear zone that are also perpendicular to the horizontal plane. Erosion has occurred creating approximately three feet of drop in areas at the base. This provides in total about seven feet of vertical drop that is perpendicular to the horizonal plane of the abutment. The height from the creek bed to the horizonal plane of the abutment is 14.2 feet according to plan. (fig. 4 & 5)

It is my expert opinion based on the foregoing that it is readily foreseeable that if the southwest wing of the abutment at Deer Creek is left unguarded by an appropriate guardrail that it would, with reasonable probability be hazardous and dangerous to the motorists proceeding easterly on Interstate 70 at Deer Creek.

It is my expert opinion based on the foregoing that the southwest wing of the abutment was not properly guarded to eliminate the hazard and danger to these motorists and that the Ohio legislature in R.C. 5591.36 has required guardrails as a safety measure with regard to such a wash bank that exists at Deer Creek. (Al)

The failure of the public officials responsible to properly safeguard the southwest wing of the abutment wall at Deer Creek was one of the proximate causes of the accident that occurred there on June 13, 1992 when Nino Cavaliere operated his Chevy Van over

this abutment into the creek in which he and his passengers were injured or killed (A2 & A3).

In my expert opinion the accident site at Deer Creek was and is extremely dangerous and constitutes an absolute nuisance because of the reasonable probability of causing injury to the motoring public traveling on Interstate 70.

Affiant says the black and white enlarged photographic copies have been compared to the photographs taken on April 7, 1995. The copies truly depict the eastbound lane-southwest area, southwest wing of the abutment and creek bank along the side of Interstate Highway 70 at both sites.

Further Affiant sayeth naught,

Joseph P. Myers (Signature)
Joseph P. Myers, P.E., P.S.

SWORN TO AND SUBSCRIBED IN MY PRESENCE THIS 6th day of May, 1995.

Mary M. Myers (Signature)
Notary Public in State of Ohio

Mary M. Myers-Notary Public
Franklin County, Ohio
My Commission Expires . . .
June 1, 1996

O CONST I § 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

O CONST IV § 2 ORGANIZATION AND JURISDICTION OF SUPREME COURT

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great

general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

THE CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove

such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Proposed 1866, Adopted 1868)

2743.02 WAIVER OF IMMUNITY OF STATE; PERSONAL IMMUNITY NOT AVAILABLE TO STATE; HOSPITALS OF POLITICAL SUBDIVISIONS; COLLATERAL RECOVERY; INDEMNIFICATION OF PERSONNEL; ACTIONS AGAINST STATE PERSONNEL; THIRD-PARTY COMPLAINTS AND COUNTERCLAIMS

(A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court

of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined under section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising

out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of his duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if such hospital requests him to do so, the superintendent shall recommend, a specific amount for any period that, in his opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for two thousand five hundred dollars or less,

that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

(G) Whenever a claim lies against an officer or employee who is a member of the Ohio national guard, and the officer or employee was, at the time of the act or omission complained of, subject to the "Federal Tort Claims Act," 60 Stat. 842 (1946), 28 U.S.C. 2671, et seq., then the Federal Tort Claims Act is the exclusive remedy of the claimant and the state has no liability under this section.

OHIO R.C. § 5535.15 ROAD CONSTRUCTION OR IMPROVEMENT BY COUNTY, TOWNSHIP, OR MUNICIPAL CORPORATION

(A) The board of county commissioners, board of township trustees, or legislative authority of a municipal corporation may maintain, repair, construct, reconstruct, improve, or widen any section of a road under the control of the state or another political subdivision if all of the following apply:

(1) The county, township, or municipal corporation proposing the project declares to the state or political subdivision the reasonable necessity of the construction or improvement. The declaration shall be by resolution or ordinance. A certified copy shall be sent to the director of transportation when a state highway is the subject of the proposal and to the affected political subdivision when any other highway is the subject of the proposal.

(2) The documents, plans, reports, or other materials relating to the project comply with applicable design development criteria of the department of transportation and the federal highway administration, which compliance is determined by the director in the manner provided in section 5521.13 of the Revised Code;

(3) The county, township, or municipal corporation proposing the project certifies to the state or political subdivision, in the resolution or ordinance required by division (A)(1)

of this section, that all funds necessary to complete the project are available either privately or from the county, township, or municipal corporation proposing the project.

The county, township, or municipal corporation proposing the project may acquire by gift, purchase, condemnation, or otherwise, any lands required for the construction or improvement.

(B) Upon compliance with the requirements of division (A) of this section, the county, township, or municipal corporation proposing the project may proceed only with the consent of the department. The state or other political subdivision having control over the road may contribute to the cost of the construction or improvement.

(C) Any person may appeal an action taken by a county, township, or municipal corporation under this section. The appeal may be taken to the probate court or the court of common pleas of any county in which any part of the construction or improvement is located, and shall be limited to a determination of compliance with division (A) of this section.

(D) After completion of the project, the state or political subdivision having control of the road shall repair and maintain it if the project is accepted by the state or political subdivision. Upon such acceptance, the county, township, or municipal corporation constructing or improving the road under this section may

contribute to the cost of repair and maintenance of the road. If the project is not accepted by the state or political subdivision having control of the road, the county, township, or municipal corporation constructing or improving the road shall repair and maintain it.

OHIO R.C. § 5591.36 GUARDRAILS OR HEDGE FENCE FOR BRIDGES

The board of county commissioners shall erect and maintain, where not already done, one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high and on each side of every approach to a county bridge, viaduct, or culvert, if the approach or embankment is more than six feet high. The board shall also protect, by suitable guardrails, all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway other than state highways, or are adjacent thereto in an unprotected condition.

It shall be a sufficient compliance with this section, if the board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required. Such guardrails or hedge fences shall be erected in a substantial manner, having sufficient strength to protect life and property, the expense thereof to be paid out of the county bridge fund.

OHIO R.C. § 5591.37 NONCOMPLIANCE

Failure to comply with section 5591.36 of the Revised Code shall render the county liable for all accidents or damages as a result of such failure.

It shall be a sufficient compliance with this section, if the board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required. Such guardrails or hedge fences shall be erected in a substantial manner, having sufficient strength to protect life and property, the expense thereof to be paid out of the county bridge fund.

AMENDED SUBSTITUTE HOUSE BILL No. 350

Act Effective Date: 1-27-97
Date Passed: 9-26-96
Date Approved by Governor: 10-28-96
Date Filed: 10-28-96
File Number: 244
Chief Sponsor: TIBERI

2744.01 Definitions (Eff. 1-27-97)

As used in this chapter:
(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.
(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of <<- his ->> <<+ the officer's, agent's, employee's, or

servant's +>> employment for a political subdivision. "Employee" does not include an independent contractor <<- , ->> <<+ and +>> does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:
(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;
(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;
(c) The provision of a system of public education;
(d) The provision of a free public library system;
(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;
(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;
(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;
(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;
(i) The enforcement or nonperformance of any law;

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inoculation program by any supplier, manufacturer,
distributor, or developer of the drug or vaccine;
(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;
(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the
approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection
with buildings or structures;
(q) Urban renewal projects and the elimination of slum conditions;
(r) Flood control measures;
(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;
(t) The issuance of revenue obligations under section 140.06 of the Revised Code;
(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo, zoological park, bath, or swimming pool or pond, and the operation and
control of any golf course;
(v) The provision of public defender

services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
(w) A function that the general assembly mandates a political subdivision to perform.
(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.
(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.
(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that
of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code,
regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the
Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964,

regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, a fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, and county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but

not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
(d) The maintenance, destruction, operation, and upkeep of a sewer system;
(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.
(H) <<+ " Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices, unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices. +>>
<<+ (I) +>> "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

OHIO R.C. § 2744.02 Political subdivision not liable for injury, death, or loss; exceptions [Eff. 1-27-97]
(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and
proprietary functions. Except as provided in division (B) of this section, a political subdivision is not

liable in damages in a civil action for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary
function.
(2) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or broughtpursuant to this chapter.
(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:
(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property caused by the negligent operation of any motor vehicle by their employees upon the public roads <<- , highways, or streets ->> when the employees are engaged within the scope of their employment and authority. The following are full defenses to <<- such ->> <<+ that +>> liability:
(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not

constitute willful or wanton misconduct;
(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;
(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter 4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.
(2) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.
(3) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property caused by their <<+ negligent +>> failure to keep public roads <<- ,

highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, ->> in repair <<- , and free from nuisance ->> <<+ and other negligent failure to remove obstructions from public roads +>> , except that it is a full defense to <<- such ->> <<+ that +>> liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property that is caused by the negligence of their employees and that occurs within or on the grounds of <<+ , and is due to physical defects within or on the grounds of, +>> buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to <<- persons ->> <<+ person +>> or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code.

Liability shall not be construed to exist under another section of the Revised Code merely because <<+ that section imposes +>> a responsibility <<- is imposed ->> <<+ or mandatory duty +>> upon a political subdivision <<- or ->> <<+ , +>> because of a general authorization <<+ in that section +>> that a political subdivision may sue and be sued <<+ , or because that section uses the term "shall" in a provision pertaining to a political subdivision. +>>
<<+ (C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744. or any other provision of the law is a final order. +>>

OHIO R.C § 2744.03 Defenses and immunities [Eff. 1-27-97]

(A) In a civil action brought against a political subdivision or
an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses
or immunities may be asserted to establish nonliability:
(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial,prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.
(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.
(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of <<- his ->> <<+ the person's +>> sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2151.355 of the Revised Code, and if, at the time of <<- his ->> <<+ the

person's or child's +>> injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or section 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) <<- His ->> <<+ The employee's +>> acts or omissions were manifestly outside the scope of <<- his ->> <<+ the employee's +>> employment or official responsibilities;

(b) <<- His ->> <<+ The employee's +>> acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Liability is expressly imposed upon the employee by a section of the Revised Code. <<+ Liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because of a general authorization in that

section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee. +>>
(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.
(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

OHIO R.C. § 2744.04.

(A) An action against a political subdivision to recover damages for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by any act or omission in connection with a governmental or proprietary function, whether brought as an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, shall be brought within two years after the cause of action <<- arose ->> <<+ accrues +>>, or within any applicable shorter period of time for bringing the action provided by the Revised Code. <<+ The period of limitation contained in this division shall be tolled pursuant to section

2305.16 of the Revised Code+>>
This division applies to actions brought against political subdivisions by all persons, governmental entities, and the state.
(B) In the complaint filed in a civil action against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to <<- persons ->> <<+ person +>> or property allegedly caused by an act or omission in connection with a governmental or proprietary function, whether filed in an original action, cross-claim, counterclaim, third-party claim, or claim for subrogation, the complainant shall include a demand for a judgment for the damages that the judge in a nonjury trial or the jury in a jury trial finds that the complainant is entitled to be awarded, but shall not specify in that demand any monetary amount for damages sought.

R.C. § 2744.05.

Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a political subdivision to recover damages for injury, death, or loss to <<- persons ->> <<+person +>> or property caused by an act or omission in connection with a governmental or proprietary function:
(A) Punitive or exemplary damages shall not be awarded <<- ; ->> <<+ . +>>
(B) <<+ (1) +>> If a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount

of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to <<- such ->> <<+ those +>> benefits. <<- Nothing ->> <<+ The amount of the benefits shall be deducted from an award against a political subdivision under division (B)(1) of this section regardless of whether the claimant may be under an obligation to pay back the benefits upon recovery, in whole or in part, for the claim. A claimant whose benefits have been deducted from an award under division (B)(1) of this section is not considered fully compensated and shall not be required to reimburse a subrogated claim for benefits deducted from an award pursuant to division (B)(1) of this section. +>>

(2) <<+ Nothing +>> in <<- this ->> division (B)(1) <<+ of this section +>> shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds.

(C)(1) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor

of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a political subdivision.

(2) As used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:

(a) All wages, salaries, or other compensation lost by the person injured as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and future expected lost earnings of <<- such a ->> <<+ the +>> person <<+ injured +>> ;

(b) All expenditures of the person injured or another person on <<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary because of the injury;

(c) All expenditures to be incurred in the future, as determined by the court, by the person injured or another person on <<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that will be necessary because of the injury;

(d) All expenditures of a person whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person whose property was injured or destroyed +>> in order to

repair or replace the property that was injured or destroyed;
(e) All expenditures of the person injured or <<+ of the person +>> whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or of the person whose property was injured or destroyed +>> in relation to the actual preparation or presentation of the <<- person's ->> claim <<+ involved +>> ;
(f) Any other expenditures of the person injured or <<+ of the person +>> whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or of the person whose property was injured or destroyed +>> that the court determines represent an actual loss experienced because of the personal or property injury or property loss.
"The actual loss of the person who is awarded the damages" does not include any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss, and does not include any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured, for mental anguish, or for any other intangible loss.

R.C. § 2744.06.
(A) Real or personal property, and moneys, accounts, deposits, or investments of a political subdivision are not subject to execution, judicial sale, garnishment, or attachment to satisfy a judgment rendered

against a political subdivision in a civil action to recover damages for injury, death, or loss to <<- persons ->> <<+ person +>> or property caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. <<- Such ->> <<+ Those +>> judgments shall be paid from funds of the political subdivisions that have been appropriated for that purpose, but, if sufficient funds are not currently appropriated for the payment of judgments, the fiscal officer of a political subdivision shall certify the amount of any unpaid judgments to the taxing authority of the political subdivision for inclusion in the next succeeding budget and annual appropriation measure and payment in the next succeeding fiscal year as provided by section 5705.08 of the Revised Code,unless any <<- such ->> judgment <<+ of that nature +>> is to be paid from the proceeds of bonds issued pursuant to section 133.14 of the Revised Code or pursuant to annual installments authorized by division (B) or (C) of this section. (B)(1)(a) as used in this division, "the actual loss of the person who is awarded the damages" includes all of the following:
(i) All wages, salaries, or other compensation lost by the person injured as a result of the injury, as of the date of the judgment;
(ii) All expenditures of the person injured or of another person on <<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services, products, or accommodations that were necessary

because of the injury;
(iii) All expenditures of a person whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person whose property was injured or destroyed +>> in order to repair or replace the property that was injured or destroyed;
(iv) All expenditures of the person injured or whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or whose property was injured or destroyed +>> in relation to the actual preparation or presentation of the <<- person's ->> claim <<+ involved +>> ;
(v) Any other expenditures of the person injured or <<- of the person ->> whose property was injured or destroyed or of another person on <<- his ->> behalf <<+ of the person injured or whose property was injured or destroyed +>> that the court determines represent an actual loss experienced because of the personal or property injury or property loss.
(b) As used in this division, "the actual loss of the person who is awarded the damages" does not include any of the following:
(i) Wages, salaries, or other compensation lost by the person injured as a result of the injury, that are future expected earnings of <<- such a ->> <<+ that +>> person;
(ii) Expenditures to be incurred in the future, as determined by the court, by the person injured or by another person on <<- his ->> behalf <<+ of the person injured +>> for medical care or treatment, for rehabilitation services, or for other care, treatment, services,

products, or accommodations that will be necessary because of the injury;
(iii) Any fees paid or owed to an attorney for any services rendered in relation to a personal or property injury or property loss;
(iv) Any damages awarded for pain and suffering, for the loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education of the person injured,
for mental anguish, or for any other intangible loss.
(2) Except as specifically provided to the contrary in this division, a court that renders a judgment against a political subdivision as described in division (A) of this section and that is not in favor of the state may authorize the political subdivision, upon the motion of the political subdivision, to pay the judgment or a specified portion of the judgment in annual installments over a period not to exceed ten years, subject to the payment of interest at the rate specified in <<+ division (A) of +>> section 1343.03 of the Revised Code. A court shall not authorize the payment in installments under this division of any portion of a judgment or entire judgment that represents the actual loss of the person who is awarded the damages. Additionally, a court shall not authorize the payment in installments under this division of any portion of a judgment or entire judgment that does not represent the actual loss of the person who is awarded the damages unless the court, after balancing the interests of the political subdivision and of the person in whose favor the

judgment was rendered, determines that installment payments would be appropriate under the circumstances and would not be unjust to the person in whose favor the judgment was rendered. If a court makes <<- such ->> a determination <<+ of that nature +>> , it shall fix the amount of the installment payments in <<- such ->> a manner <<- as to achieve ->> <<+ that achieves +>> for the person in whose favor the judgment was rendered <<- , ->> the same economic result over the period as <<-he ->> <<+ that person +>> would have received if the judgment or portion of the judgment subject to the installment payments had been paid in a lump sum payment.

(C) At the option of a political subdivision, a judgment as described in division (A) of this section and that is rendered in favor of the state may be paid in equal annual installments over a period not to exceed ten years, without the payment of interest.

<< Note: OH ST s 2305.11 >>

(B) The amendments to section 2305.11 of the Revised Code made in this act shall apply only to acts or omissions constituting the alleged basis of a claim of malpractice or of a medical, dental, optometric, or chiropractic claim, as defined in that section, that occur on or after the effective date of this act.

<< Note: OH ST s 2744.05 >>

(C) The amendments to section 2744.05 of the Revised Code made in this act

shall apply only to actions against a political subdivision under Chapter 2744. of the Revised Code that are commenced on or after the effective date of this act.

<< OH ST s 5591.36 >>

Sec. 5591.36. <<- The ->> <<+ On county roads, the +>> board of county commissioners shall erect and maintain, where not already done, one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high <<- and on each side of every approach to a county bridge, viaduct, or culvert, if the approach or embankment is more than six feet high ->> . The board <<+ also +>> shall <<- also ->> protect, by <<- suitable ->> guardrails, all <<- perpendicular wash banks more than eight feet in height ->> <<+ embankments with a rise of more than eight feet in height and with a downward slope of greater than seventy degrees +>> , where <<- such banks ->> <<+ the embankments +>> have an immediate connection with a <<- public highway other than state highways, or are adjacent thereto in an unprotected condition ->> <<+ county road. +>>
<<- It shall be a sufficient compliance with this section, if the board causes to be erected and maintained a good stockproof hedge fence where a guardrail is required. Such guardrails or hedge fences shall be erected in a substantial manner, having sufficient strength to protect life and property, the ->> <<+ The +>> expense <<- thereof to ->> <<+ for a guardrail required under this section shall +>>

be paid out of the county bridge fund.

<< OH ST s 5591.37 >>
Sec. 5591.37. <<- Failure ->> <<+ Negligent failure +>> to comply with section 5591.36 of the Revised Code shall render the county liable for all accidents or damages as a result of <<- such ->> <<+ that +>> failure.

<< Repealed: OH ST ss 2305.131, 2305.27, 2307.42, 2307.43, 2309.01 >>

Section 2. That existing sections 109.36, 163.17, 723.01, 1343.03, 1701.95, 1707.01, 1775.14, 1901.041, 1901.17, 1901.18, 1901.181, 1901.20, 1905.032, 2117.06, 2125.01, 2125.02, 2125.04, 2305.01, 2305.10, 2305.11, 2305.16, 2305.25, 2305.251, 2305.35, 2305.37, 2305.38, 2307.31, 2307.32, 2307.33, 2307.60, 2307.61, 2307.71, 2307.72, 2307.73, 2307.75, 2307.78, 2307.80, 2315.01, 2315.18, 2315.19, 2315.20, 2315.21, 2317.45, 2317.62, 2323.51, 2501.02, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.04, 2744.05, 2744.06, 3113.219, 3701.19, 3722.08, 4112.02, 4112.14, 4112.99, 4113.52, 4171.10, 4399.18, 4507.07, 4513.263, 4582.27, 4909.42, 5111.81, 5591.36, and 5591.37 and sections 2305.131, 2305.27, 2307.42, 2307.43, and 2309.01 of the Revised Code are hereby repealed.

23 USCS § 101. Definitions and declaration of policy

(a) As used in this title, unless the context requires otherwise—
The term "apportionment" in accordance with section 104 of this title includes

unexpended apportionments made under prior acts.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping (including the establishment of temporary and permanent geodetic markers in accordance with specifications of the National Oceanic and Atmospheric Administration in the Department of Commerce), resurfacing, restoration, and rehabilitation, acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, elimination of roadside obstacles, acquisition of replacement housing sites, acquisition and rehabilitation, relocation, and construction of replacement housing, and improvements which directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channelization of traffic, traffic control systems, and passenger loading and unloading areas. The term also includes capital improvements which directly facilitate an effective vehicle weight enforcement program, such as scales (fixed and portable), scale pits, scale installation, and scale houses and also includes costs incurred by the State in performing Federal-aid project related audits which directly benefit the Federal-aid highway program.

The term "county" includes corresponding units of government under any other name in States which do not have county organizations, and likewise in those States in which the county government does not have jurisdiction over highways it may be construed to mean any local

government unit vested with jurisdiction over local highways.
The term "Federal lands highways" means forest highways, public lands highways, park roads, parkways, and Indian reservation roads which are public roads.
The term "forest road or trail" means a road or trail wholly or partly within, or adjacent to, and serving the Natonal [National] Forest system and which is necessary for the protection, administration, and utilization of the National Forest system and the use and development of its resources.
The term "forest development roads and trails" means a forest road or trail under the jurisdiction of the Forest Service.
The term "forest highway" means a forest road under the jurisdiction of, and maintained by, a public authority and open to public travel.
The term "highway" includes roads, streets, and parkways, and also includes rights-of-way, bridges, railroad-highway crossings, tunnels, drainage structures, signs, guardrails, and protective structures, in connection with highways. It further includes that portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State highway department including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.
The term "Federal-aid highways" means highways eligible for assistance under this chapter [23 USCS ^U^U101 et seq.] other than highways classified as local

roads or rural minor collectors.
The term "highway safety improvement project" means a project which corrects or improves high hazard locations, eliminates roadside obstacles, improves highway signing and pavement marking, installs priority control systems for emergency vehicles at signalized intersections, installs or replaces emergency motorist-aid call boxes, or installs traffic control or warning devices at high accident potential locations.
The term "Indian reservation roads" means public roads that are located within or provide access to an Indian reservation or Indian trust land or restricted Indian land which is not subject to fee title alienation without the approval of the Federal Government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.
The term "maintenance" means the preservation of the entire highway, including surface, shoulders, roadsides, structures, and such traffic-control devices as are necessary for its safe and efficient utilization.
The term "park road" means a public road, including a bridge built primarily for pedestrian use, but with capacity for use by emergency vehicles, that is located within, or provides access to, an area in the national park system with title and maintenance responsibilities vested in the United States.
The term "parkway" as used in chapter 2 of this title [23 USCS ^U^U201 et seq.],

means a parkway authorized by an Act of Congress on lands to which title is vested in the United States.
The term "project" means an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed.
The term "project agreement" means the formal instrument to be executed by the State highway department and the Secretary as required by the provisions of subsection (a) of section 110 of this title.
The term "public lands development roads and trails" means those roads or trails which the Secretary of the Interior determines are of primary importance for the development, protection, administration, and utilization of public lands and resources under his control.
The term "public lands highways" means those main highways through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations, which are on the Federal-aid systems.
The term "public road" means any road or street under the jurisdiction of and maintained by a public authority and open to public travel.
The term "rural areas" means all areas of a State not included in urban areas.
The term "Secretary" means Secretary of Transportation.
The term "urbanized area" means an area with a population of 50,000 or more designated by the Bureau of the Census, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Boundaries

shall, at a minimum, encompass the entire urbanized area within a State as designated by the Bureau of the Census.
The term "State" means any one of the fifty States, the District of Columbia, or Puerto Rico.
The term "State funds" includes funds raised under the authority of the State or any political or other subdivision thereof, and made available for expenditure under the direct control of the State highway department.
The term "State highway department" means that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction.
The term "Federal-aid system" means any one of the Federal-aid highway systems described in section 103 of this title.
The term "National Highway System" means the Federal-aid highway system described in subsection (b) of section 103 of this title.
The term "Interstate System" means the Dwight D. Eisenhower [National] System of Interstate and Defense Highways described in subsection (e) of section 103 of this title.
The term "startup costs for traffic management and control" means initial costs (including labor costs, administration costs, cost of utilities, and rent) for integrated traffic control systems, incident management programs, and traffic control centers.
The term "carpool project" means any project to encourage the use of carpools and vanpools, including but not limited to provision of carpooling opportunities to the elderly and handicapped, systems for locating potential riders and informing them of carpool opportunities,

acquiring vehicles for carpool use, designating existing highway lanes as preferential carpool highway lanes, providing related traffic control devices, and designating existing facilities for use for preferential parking for carpools.

The term "public authority'" means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities.

The term "public lands highway" means a forest road under the jurisdiction of and maintained by a public authority and open to public travel or any highway through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations under the jurisdiction of and maintained by a public authority and open to public travel.

The term "operational improvement" means a capital improvement for installation of traffic surveillance and control equipment, computerized signal systems, motorist information systems, integrated traffic control systems, incident management programs, and transportation demand management facilities, strategies, and programs and such other capital improvements to public roads as the Secretary may designate, by regulation; except that such term does not include resurfacing, restoring, or rehabilitating improvements, construction of additional lanes, interchanges, and grade separations, and construction of a new facility on a new location.

The term "urban area" means an urbanized

area or, in the case of an urbanized area encompassing more than one State, that part of the urbanized area in each such State, or an urban place as designated by the Bureau of the Census having a population of five thousand or more and not within any urbanized area, within boundaries to be fixed by responsible State and local officials in cooperation with each other, subject to approval by the Secretary. Boundaries shall, at a minimum, encompass the entire urbanized area within a State as designated by the Bureau of the Census.

The term "transportation enhancement activities" means, with respect to any project or the area to be served by the project, provision of facilities for pedestrians and bicycles, acquisition of scenic easements and scenic or historic sites, scenic or historic highway programs, landscaping and other scenic beautification, historic preservation, rehabilitation and operation of historic transportation buildings, structures, or facilities (including historic railroad facilities and canals), preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian or bicycle trails), control and removal of outdoor advertising, archaeological planning and research, and mitigation of water pollution due to highway runoff.

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways [Dwight D. Eisenhower System of Interstate and Defense Highways], since many of such highways, or portions

thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways [Dwight D. Eisenhower System of Interstate and Defense Highways], so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System", is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the forty years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending September 30, 1996, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374), and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

It is further declared that since the Interstate System is now in the final phase of completion it shall be the national policy that increased emphasis be placed on the construction and

reconstruction of the other Federal-aid systems in accordance with the first paragraph of this subsection, in order to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent.

(c) It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation, for purposes and projects as provided in this title, by any officer or employee in the executive branch of the Federal Government, except such specific sums as may be determined by the Secretary of the Treasury, after consultation with the Secretary of Transportation, are necessary to be withheld from obligation for specific periods of time to assure that sufficient amounts will be available in the Highway Trust Fund to defray the expenditures which will be required to be made from such fund.

(d) No funds authorized to be appropriated from the Highway Trust Fund shall be expended by or on behalf of any Federal department, agency, or instrumentality other than the Federal Highway Administration unless funds for such expenditure are identified and included as a line item in an appropriation Act and are to meet obligations of the United States heretofore or hereafter incurred under this title attributable to the construction of Federal-aid highways or highway planning, research, or development, or as otherwise specifically authorized to be

appropriated from the Highway Trust Fund by Federal-aid highway legislation.
(e) It is the national policy that to the maximum extent possible the procedures to be utilized by the Secretary and all other affected heads of Federal departments, agencies, and instrumentalities for carrying out this title and any other provision of law relating to the Federal highway programs shall encourage the substantial minimization of paperwork and interagency decision procedures and the best use of available manpower and funds so as to prevent needless duplication and unnecessary delays at all levels of government.

23 USCS § 103. Federal-aid systems

(a) In general. For purposes of this title, the Federal-aid systems are the Interstate System and the National Highway System.
(b) National Highway System.(1) Purpose. The purpose of the National Highway System is to provide an interconnected system of principal arterial routes which will serve major population centers, international border crossings, ports, airports, public transportation facilities, and other intermodal transportation facilities and other major travel destinations; meet national defense requirements; and serve interstate and interregional travel.

(2) Components. The National Highway System shall consist of the following:

(A) Highways designated as part of the Interstate System under subsection (e) and section 139 of this title.

(B) Other urban and rural principal arterials and highways (including toll facilities) which provide motor vehicle access between such an arterial and a major port, airport, public transportation facility, or other intermodal transportation facility. The States, in cooperation with local and regional officials, shall propose to the Secretary arterials and highways for designation to the National Highway System under this paragraph. In urbanized areas, the local officials shall act through the metropolitan planning organizations designated for such areas under section 134 of this title. The routes on the National Highway System, as shown on the map submitted by the Secretary to the Committee on Public Works and Transportation of the House of Representatives and the Committee on Environment and Public Works of the Senate in 1991, illustrating the National Highway System, shall serve as the basis for the States in proposing arterials and highways for designation to such system. The Secretary may modify or revise such proposals and submit such modified or revised proposals to Congress for approval in accordance with paragraph (3).

(C) A strategic highway network which is a network of highways which are important to the United States strategic defense policy and which provide defense access, continuity, and emergency capabilities for the movement of personnel, materiels, and equipment in both peace time and war time. Such highways may include highways on and off the Interstate System and shall be designated by the Secretary in

consultation with appropriate Federal agencies and the States and be subject to approval by Congress in accordance with paragraph (3).

(D) Major strategic highway network connectors which are highways that provide motor vehicle access between major military installations and highways which are part of the strategic highway network. Such highways shall be designated by the Secretary in consultation with appropriate Federal agencies and the States and subject to approval by Congress in accordance with paragraph (3).

(3) Approval of designations.(A) Proposed designations. Not later than 2 years after the date of the enactment of this section [Dec. 18, 1991], the Secretary shall submit for approval to the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives a proposed National Highway System with a list and description of highways proposed to be designated to the National Highway System under this subsection and a map showing such proposed designations. In preparing the proposed system, the Secretary shall consult appropriate local officials and shall use the functional reclassification of roads and streets carried out under subsection (c) of section 1006 of the Intermodal Surface Transportation Efficiency Act of 1991.

(B) Approval of congress required. After September 30, 1995, no funds made available for carrying out this title may be apportioned for the National Highway System or the Interstate maintenance program under

this title unless a law has been approved designating the National Highway System.

(C) Maximum mileage. For purposes of proposing highways for designation to the National Highway System, the mileage of highways on the National Highway System shall not exceed 155,000 miles; except that the Secretary may increase or decrease such maximum mileage by not to exceed 15 percent.

(D) Equitable allocations of highway mileage. In proposing highways for designation to the National Highway System, the Secretary shall provide for equitable allocation of highway mileage among the States.

(4) Interim system. For fiscal years 1992, 1993, 1994, and 1995, highways classified as principal arterials by the States shall be treated as being on the National Highway System for purposes of this title.

(c), (d) [Repealed]

(e) Interstate system.(1) Designation; mileage limitation. The Interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be

selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (f) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

(2) Modifications. In addition to the mileage authorized by the first sentence of paragraph (1) of this subsection, there is hereby authorized additional mileage for the Interstate System of five hundred miles, to be used in making modifications or revisions in the Interstate System as provided in this paragraph. Upon the request of a State highway department the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within that State selected and approved in accordance with this title, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System (including urban routes necessary for metropolitan transportation) and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. After the Secretary has withdrawn his approval of any such route or portion thereof the mileage of such route or portion thereof and the additional mileage authorized by

the first sentence of this paragraph shall be available for the designation of interstate routes or portions thereof as provided in this subsection. The provisions of this title applicable to the Interstate System shall apply to all mileage designated under the third sentence of this paragraph. The Secretary shall not designate any Interstate route or portion thereof under authority of this paragraph after the date of enactment of the Federal Aid Highway Act of 1978 [Nov. 6, 1978].

(3) Additional mileage for improved efficiency. In addition to the mileage authorized by paragraphs (1) and (2) of this subsection, there is hereby authorized additional mileage of not to exceed 1,500 miles for the designation of routes in the same manner as set forth in paragraph (1), in order to improve the efficiency and service of the Interstate System to better accomplish the purposes of that System.

(4) Interstate substitute program.(A) Withdrawal of approval. Upon the joint request of a State Governor and the local governments concerned, the Secretary may withdraw approval of any route or portion thereof on the Interstate System which was selected and approved in accordance with this title, if the Secretary determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System and if the Secretary receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by the route or portion thereof.

(B) Substitute projects. When the Secretary withdraws approval under

this paragraph, a sum equal to the Federal share of the cost to complete the withdrawn route or portion thereof, as that cost is included in the latest Interstate System cost estimate approved by Congress, or up to and including the 1983 interstate cost estimate, whichever is earlier, subject to increase or decrease, as determined by the Secretary based on changes in construction costs of the withdrawn route or portion thereof as of the date of approval of each substitute project under this paragraph, or the date of approval of the 1983 interstate cost estimate, whichever is earlier, shall be available to the Secretary to incur obligations for the Federal share of either public mass transit projects involving the construction of fixed rail facilities or the purchase of passenger equipment including rolling stock, for any mode of mass transit, or both, or highway construction projects on any public road, or both, which will serve the area or areas from which the interstate route or portion thereof was withdrawn, which are selected by the responsible local officials of the area or areas to be served, and which are selected by the Governor or the Governors of the State or the States in which the withdrawn route was located if the withdrawn route was not within an urbanized area or did not pass through and connect urbanized areas, and which are submitted by the Governors of the States in which the withdrawn route was located. Each project constructed under this paragraph on a Federal-aid system shall be subject to the provisions of this title applicable to such system. Each project constructed under this paragraph not on

a Federal-aid system shall be subject to the provisions of this title applicable to projects on the Federal-aid secondary system.

(C) Deadline for withdrawal. The Secretary shall not approve any withdrawal of a route under this paragraph after September 30, 1983—

(i) except that with respect to any route which on November 6, 1978, is under judicial injunction prohibiting its construction the Secretary may approve withdrawals until September 30, 1986, and

(ii) except that with respect to any route which on May 12, 1982, is under judicial injunction prohibiting its construction, the Secretary may approve withdrawals on such route until September 30, 1985.

(D) Project approval; Federal share. Approval by the Secretary of the plans, specifications, and estimates for a substitute project shall be deemed to be a contractual obligation of the Federal Government. The Federal share of each substitute project shall not exceed 85 percent of the cost thereof.

(E) Availability of funds for substitute projects.(i) Time period. The sums apportioned and the sums allocated under this paragraph for public mass transit projects and for highway construction projects in a State shall remain available for obligation in such State for the fiscal year for which apportioned or allocated, as the case may be, and for the succeeding fiscal year. In the case of funds authorized to be appropriated for substitute transit projects under this paragraph for fiscal year 1993 and for substitute highway projects under this paragraph for fiscal

year 1995, such funds shall remain available until expended.

(ii) Reapportionment or reallocation. Any sums which are apportioned or allocated to a State and are unobligated (other than an amount which, by itself, is insufficient to pay the Federal share of the cost of a substitute project which has been submitted by the State to the Secretary for approval) at the end of the period of availability established by clause (i) shall be apportioned or allocated, as the case may be, among those States which have obligated all sums (other than such an amount) apportioned or allocated, as the case may be, to them. Such reapportionments shall be in accordance with the latest approved or adjusted estimate of the cost of completing substitute projects, and such reallocations shall be at the discretion of the Secretary.

(F) Administration of transit funds. The sums obligated for mass transit projects under this paragraph shall become part of, and be administered through, the Urban Mass Transportation Fund.

(G) Authorization of appropriations for highway projects. For the fiscal year ending September 30, 1983, $257,000,000 shall be available out of the Highway Trust Fund for expenditure at the discretion of the Secretary for projects under highway assistance programs. There shall be available, out of the Highway Trust Fund (other than the Mass Transit Account), to the Secretary for expenditure under this paragraph for projects under highway assistance programs $700,000,000 per fiscal year for each of fiscal years

1984 and 1985, $693,825,000 for fiscal year 1986, $740,000,000 per fiscal year for each of fiscal years 1987, 1988, 1989, 1990, and 1991, [and] $240,000,000 per fiscal year for each of fiscal years 1992, 1993, 1994, and 1995. Such sums may be obligated for transit substitute projects under this paragraph.

(H) Distribution of substitute highway funds.(i) Between discretionary and apportioned programs. Subject to section 149(d) of the Federal-Aid Highway Act of 1987, 25 percent of the funds made available by subparagraph (G) for each of fiscal years 1984, 1985, 1986, 1987, 1988, 1989, 1990, and 1991 for substitute highway projects under this paragraph shall be distributed at the discretion of the Secretary. The remaining 75 percent of such funds shall be apportioned in accordance with cost estimates approved by Congress or adjusted by the Secretary. For each of fiscal years 1992, 1993, 1994, and 1995, all funds made available by subparagraph (G) shall be apportioned in accordance with cost estimates adjusted by the Secretary.

(ii) Fiscal years 1985, 1986, and 1987 apportionments. The Secretary shall make a revised estimate of the cost of completing substitute highway projects under this paragraph and transmit the same to the Senate and the House of Representatives within 10 days subsequent to January 2, 1984, and upon approval by Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for substitute highway projects for fiscal years 1985, 1986, and 1987.

(iii) Fiscal years 1988–1995 apportionments. The Secretary shall make a revised estimate of the cost of completing substitute highway projects under this paragraph and transmit the same to the Senate and the House of Representatives as soon as practicable after the date of the enactment of the Federal-Aid Highway Act of 1987 [April 2, 1987]. Upon approval by Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for substitute highway projects for fiscal year 1988. If such estimate is not approved by Congress by September 30, 1987, the Secretary shall adjust such estimate in accordance with this clause and use the Federal share of the adjusted estimate in making apportionments for fiscal year 1988. The Secretary shall adjust such estimate annually thereafter in accordance with this clause and shall use the Federal share of such adjusted estimate in making apportionments for substitute highway projects for fiscal years 1989, 1990, 1991, 1992, 1993, 1994, and 1995. The adjustments required by this clause shall reflect previous withdrawals of interstate segments, changes in State estimates in the division of funds between substitute highway and transit projects, amounts made available in prior fiscal years, and the availability and reapportionment of funds under subparagraph (E).

(I) Authorization of appropriations for transit projects. There are authorized to be appropriated for liquidation of obligations incurred for substitute transit projects under this paragraph the sums provided in section 4(g) of the Urban Mass

Transportation Act of 1964.

(J) Distribution of substitute transit funds. (i) Between discretionary and apportioned programs. Fifty percent of the funds appropriated for each fiscal year beginning after September 30, 1983, and ending before October 1, 1991[,] for carrying out substitute transit projects under this paragraph shall be distributed at the discretion of the Secretary. The remaining 50 percent of such funds shall be apportioned in accordance with cost estimates approved by Congress or adjusted by the Secretary. 100 percent of funds appropriated for each of fiscal years 1992 and 1993 shall be apportioned in accordance with cost estimates adjusted by the Secretary.

(ii) Fiscal years 1985, 1986, and 1987 apportionments. The Secretary shall make a revised estimate of the cost of completing substitute transit projects under this paragraph and transmit the same to the Senate and the House of Representatives within 10 days subsequent to January 2, 1984, and upon approval by Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for substitute transit projects for fiscal years 1985, 1986, and 1987.

(iii) Fiscal years 1988–1993 apportionments. The Secretary shall make a revised estimate of the cost of completing substitute transit projects under this paragraph and transmit the same to the Senate and the House of Representatives as soon as practicable after the date of the enactment of the Federal-Aid Highway Act of 1987 [April 2, 1987]. Upon approval by Congress, the

Secretary shall use the Federal share of such approved estimate in making apportionments for substitute transit projects for fiscal year 1988. If such estimate is not approved by Congress by September 30, 1987, the Secretary shall adjust such estimate in accordance with this clause and use the Federal share of the adjusted estimate in making apportionments for fiscal year 1988. The Secretary shall adjust such estimate annually thereafter in accordance with this clause and shall use the Federal share of such adjusted estimate in making apportionments for substitute transit projects for fiscal years 1989, 1990, 1991, 1992, and 1993. The adjustments required by this clause shall reflect previous withdrawals of Interstate segments, changes in State estimates in the division of funds between substitute highway and transit projects, amounts made available in prior fiscal years, and the availability and reapportionment of funds under subparagraph (E).

K) Reduction of interstate apportionment.(i) In general. Unobligated apportionments for the Interstate System in any State where a withdrawal is approved under this paragraph shall, on the date of such approval, be reduced in the proportion that the Federal share of the cost of the withdrawn route or portion thereof bears to the Federal share of the total cost of all interstate routes in that State as reflected in the latest cost estimate approved by the Congress.

(ii) Exception. In any State where the withdrawal of an interstate route or portion thereof has been approved under this section prior to the date of the

enactment of the Federal-Aid Highway Act of 1976 [May 5, 1976], the unobligated apportionments for the Interstate System in that State on such date of enactment shall be reduced in the proportion that the Federal share of the cost to complete such route or portion thereof, as shown in the latest cost estimate approved by Congress prior to such approval of withdrawal, bears to the Federal share of the cost of all interstate routes in that State, as shown in such cost estimate; except that the amount of such proportional reduction shall be credited with the amount of any reduction in such State's Interstate apportionment which was attributable to the Federal share of any substitute project approved under this paragraph before such date of enactment.

(L) Applicability of UMTA.(i) Supplementary funds. Funds available for expenditure to carry out the purposes of this paragraph shall be supplementary to and not in substitution for funds authorized and available for obligation pursuant to chapter 53 of title 49 [49 USCS 5301 et seq.].

(ii) Labor protection. The provisions of section 5323(a)(1)(D) of title 49 shall apply in carrying out this paragraph.

(M) Limitation on interstate designations. After the date of the enactment of the Federal-Aid Highway Act of 1978 [Nov. 6, 1978], the Secretary may not designate any mileage as part of the Interstate System pursuant to this paragraph or under any other provision of law. The preceding sentence shall not apply to a designation made under section 139 of this title.

(N) Open to traffic requirement. After September 30, 1979, the Secretary shall

not withdraw his approval under this paragraph of any route or portion thereof on the Interstate System open to traffic before the date of the proposed withdrawal. Any withdrawal of approval of any such route or portion thereof before September 30, 1979, is hereby determined to be authorized by this paragraph.

(O) Limitation on substitution for statutorily designated routes. Any route or segment which was statutorily designated after March 7, 1978, to be on the Interstate System shall not be eligible for withdrawal or substitution under this subsection.

(P) Right-of-way payback.(i) Enforcement. Of sums apportioned or allocated under this paragraph to a State, the Secretary shall not obligate for projects in such State an amount equal to the amount of Federal funds expended to purchase the right-of-way for any withdrawn route or portion thereof if the right-of-way is not first disposed of (or applied to a project in accordance with paragraph (5)(B), (6)(B), or (7)) by the State.

(ii) Limitation on applicability. Clause (i) shall not apply to sums apportioned or allocated under this paragraph to a State for a fiscal year if the projected total amount of funds to be apportioned and allocated under this paragraph to such State in succeeding fiscal years exceeds the amount of Federal funds expended to purchase the right-of-way.

(iii) Release of funds. The Secretary may obligate for projects in a State under this paragraph any funds withheld from obligation in such State if the State repays an equivalent amount in accordance with paragraph (5)(B),

(6)(B), or (7), as the case may be, or if the Secretary determines that such repayment is not required under such paragraph.

(5) Limitation on refunds for withdrawals before November 6, 1978. Notwithstanding any other provision of law, in the case of any withdrawal of approval before November 6, 1978—

(A) upon the withdrawal of approval of any route or portion thereof on the Interstate System under this section, a State, subject to the approval of the Secretary, shall not be required to refund to the Highway Trust Fund any sums paid to the State for intangible costs;

(B) refund will not be required for the costs of construction items, materials, or rights-of-way of the withdrawn route or portion of the Interstate System which will be or have been applied (i) to a transportation project permissible under this title, (ii) to a public conservation or public recreation purpose, or (iii) to such other public purpose as may be determined by the Secretary to be in the public interest on condition that the State shall make assurances satisfactory to the Secretary that such construction items or materials or rights-of-way have been or will be so applied by the State of any political subdivision thereof to a project under clause (i), (ii), or (iii) within 10 years from the date of the withdrawal of approval.

(6) Limitation on refunds for withdrawals on and after November 6, 1978. Notwithstanding any other provision of law—

(A) in the case of any withdrawal of approval on or after

November 6, 1978, of a route or portion thereof on the Interstate System, a State, subject to the approval of the Secretary, shall not be required to refund to the Highway Trust Fund any sums paid to the State for intangible costs;

(B) in the case of any withdrawal of approval on or after November 6, 1978, of any route or portion thereof on the Interstate System under this section, a State shall not be required to refund to the Highway Trust Fund the costs of construction items, materials, or rights-of-way of the withdrawn route or portion thereof if such items, materials, and rights-of-way were acquired before November 6, 1978, if by the date of withdrawal of approval the Secretary has not approved the environmental impact statement required by the National Environmental Policy Act of 1969 [42 USCS ^U^U4321 et seq.], and if such construction items, materials, or rights-of-way will be or have been applied (i) to a transportation project permissible under this title, (ii) to a public conservation or public recreation purpose, or (iii) to any other public purpose determined by the Secretary to be in the public interest on condition that the State gives assurances satisfactory to the Secretary that such construction items, materials, or rights-of-way have been or will be so applied by the State, or any political subdivision thereof, to a project under clause (i), (ii), or (iii) within ten years from the date of withdrawal of approval.

(7) Additional limitation on refunds. In any case where a withdrawal of approval of a route or portion

thereof on the Interstate System on or after November 6, 1978, does not come within the provisions of paragraph (6)(B) of this subsection, the State shall refund to the Highway Trust Fund the costs of construction items, materials, and rights-of-way of the withdrawn route or portion thereof, except that if the State gives assurances satisfactory to the Secretary that such items, materials, and rights-of-way have been or will be applied to a transportation project permissible under this title within ten years from the date of withdrawal of approval, the amount of such repayment shall be the difference between the amount received for such items, materials, and rights-of-way and the amount which would be received in accordance with the current Federal share applicable to the transportation project to which such items, materials, and rights-of-way were or are to be applied.

(8) Protection of property rights. Nothing in this subsection shall in any way alter rights under State law of persons owning property within the right-of-way immediately prior to such property being obtained by the State. The Federal share of the cost of property sold or otherwise transferred to previous owners under State law shall be refunded and credited to the unobligated balance of the State's apportionment for interstate highways.

(9) Limitation on funding of modified mileage projects. Interstate mileage authorized for any State and withdrawn and transferred under the provisions of paragraph (2) of this subsection after the date of enactment

of the Federal-Aid Highway Act of 1976 [May 5, 1976], must be constructed by the State receiving such mileage as part of its Interstate System. Any State receiving such transfer of mileage may not, with respect to that transfer, avail itself of the optional use of Interstate funds under the second sentence of paragraph (4) of this subsection.

(f) The Secretary shall have authority to approve in whole or in part the Interstate System, as and when such systems or portions thereof are designated, or to require modifications or revisions thereof.

(g) The Secretary, on July 1, 1974, shall remove from designation as a part of the Interstate System each segment of such system for which a State has not notified the Secretary that such State intends to construct such segment, and which the Secretary finds is not essential to completion of a unified and connected Interstate System. Any segment of the Interstate System, with respect to which a State has not submitted by July 1, 1975, a schedule for the expenditure of funds for completion of construction of such segment or alternative segment within the period of availability of funds authorized to be appropriated for completion of the Interstate System, and with respect to which the State has not provided the Secretary with assurances satisfactory to him that such schedule will be met, shall be removed from designation as a part of the Interstate System. No segment of the Interstate System removed under the authority of the preceding sentence shall thereafter be designated as a part of the Interstate System

except as the Secretary finds necessary in the interest of national defense or for other reasons of national interest. This subsection shall not be applicable to any segment of the Interstate System referred to in section 23(a) of the Federal-Aid Highway Act of 1968.

(h) Notwithstanding subsections (e)(2) and (g) of this section, in any case where a segment of the Interstate System was a designated part of such System on June 1, 1973, and is entirely within the boundaries of an incorporated city and such city enters into an agreement with the Secretary to pay all non-Federal costs of construction of such segment, such segment shall be constructed.

(i) Eligible projects for NHS. Subject to project approval by the Secretary, funds apportioned to a State under section 104(b)(1) for the National Highway System may be obligated for any of the following:

(1) Construction, reconstruction, resurfacing, restoration, and rehabilitation of segments of such system.

(2) Operational improvements for segments of such system.

(3) Construction of, and operational improvements for, a Federal-aid highway not on the National Highway System and construction of a transit project eligible for assistance under chapter 53 of title 49 [49 USCS ^U^U5301 et seq.]—

(A) if such highway or transit project is in the same corridor as, and in proximity to, a fully access controlled highway designated to the National Highway System;

(B) if the construction or improvements will improve the level of

service on the fully access controlled highway and improve regional travel; and

(C) if the construction or improvements are more cost effective than an improvement to the fully access controlled highway that has benefits comparable to the benefits which will be achieved by the construction of, or improvements to, the highway not on the National Highway System.

(4) Highway safety improvements for segments of the National Highway System.

(5) Transportation planning in accordance with sections 134 and 135.

(6) Highway research and planning in accordance with section 307.

(7) Highway-related technology transfer activities.

(8) Startup costs for traffic management and control if such costs are limited to the time period necessary to achieve operable status but not to exceed 2 years following the date of project approval, if such funds are not used to replace existing funds.

(9) Fringe and corridor parking facilities.

(10) Carpool and vanpool projects.

(11) Bicycle transportation and pedestrian walkways in accordance with section 217.

(12) Development and establishment of management systems under section 303.

(13) In accordance with all applicable Federal law and regulations, participation in wetlands mitigation efforts related to projects funded under this title, which may include participation in wetlands mitigation banks; contributions to statewide and regional efforts to conserve, restore, enhance and create wetlands; and development of statewide and regional

wetlands conservation and mitigation plans, including any such banks, efforts, and plans authorized pursuant to the Water Resources Development Act of 1990 (including crediting provisions). Contributions to such mitigation efforts may take place concurrent with or in advance of project construction. Contributions toward these efforts may occur in advance of project construction only if such efforts are consistent with all applicable requirements of Federal law and regulations and State transportation planning processes.

U.S. CONSTITUTION AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

James KNISKERN, Administrator
Estate of Cynthia Ann Cavaliere et al.,
Appellants,

v.

The TOWNSHIP of SOMERFORD et al.,
Defendants-Appellees.
Defendant-Appellees.

The STATE OF OHIO, OHIO DEPARTMENT OF TRANSPORTATION, and NINO CAVALIERE,

Defendants-Appellees.

No. 96-1861

The Supreme Court of Ohio

December 30, 1996

MOTION FOR RECONSIDERATION

Now comes the Appellants herein and moves this Honorable Court to reconsider its judgment entry order journalized December 20, 1996, in the above captioned case stating:

"Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving a substantial constitutional question."
and grant jurisdiction for the reasons set forth in the attached brief.

Respectfully submitted,

By: _____
Donald Weisberger, Counsel of Record Reg. No. 0000908

Counsel for Appellants, Kniskerns and Cavalieres

BRIEF

It is a violation of the doctrine of the separation of powers, the equal protection and due process clauses of the 14th Amendment to the U.S. Constitution, Section 16 of Article I of the Ohio Constitution, that provides for a remedy by due course of law and open courts and the equal protection guarantee of Section 2 of Article I of the Ohio Constitution, for the legislative and executive branch of the State of Ohio to pass such legislation where the jurisdiction of the Ohio Supreme Court is usurped by removing from that Court, issues in a pending case to which the State of Ohio and its political subdivisions are a party, that otherwise could qualify as legal issues of great public interest in a discretionary appeal.

The violation of the separation of powers doctrine is accomplished when the State of Ohio enacts prospective legislation that does not directly affect the law of the case sub judice, but nonetheless has the legal effect of directing and controlling the outcome of a discretionary appeal pending before the Supreme Court on the issue of great

public interest in favor of the State of Ohio and its political subdivisions, where they are interested parties.

The State of Ohio's legislature accomplished its violation of the separation of powers as to appellants when it passed Amended Substitute House Bill No. 350 on 9-26-96 while appellants claim was pending in the Supreme Court of Ohio in the above captioned case on a discretionary appeal. One of the major issues of that appeal was whether it was a matter of great public interest whether the State of Ohio and/or its political subdivisions were liable as a matter of law in nuisance at the accident site for their failure to correct the long standing nuisance on Interstate 70 created by ODOT's construction of the unsuitable guardrail protecting the wash bank that ODOT had incorporated into the bridge wingwall abutment that played a crucial role in the accident.

Substitute House Bill No. 350 was approved by the Governor of Ohio on 10-28-96 and filed on 10-28-96 with the file number 244. The Act's effective date is 1-27-97. It altered the liability of Ohio's political subdivisions for death, personal injury or loss to persons or property for their failure to keep public roads, highways, bridges or public grounds open and free from nuisance by repeal by eliminating that liability from R.C. § 2744.02(B)(3) and amending it with limited liability for negligence only.

County liability for its failure to provide a suitable guardrail at wash banks where they have an immediate connection with a public highway other than state highways, or are adjacent

thereto in an unprotected condition was also repealed in R.C. §§ 5591.36 & 5591.37 and amended to encompass only county bridges and county roads. The definition of "Public Roads" appears for the first time in R.C. § 2744.01(H). It specifically excludes berms, shoulders and rights-of-way from the definition of "public roads". All of the law on the subject prior to the foregoing repeals and amendments formed part of appellants' legal issue necessary for the successful allowance of their discretionary appeal before the Ohio Supreme Court establishing that their case was of great public interest. The enactment by the State of Ohio of Substitute House Bill No. 350 mooted those legal issues as a matter of great public interest before the Ohio Supreme Court. It constituted an exercise of unauthorized usurpation of judicial or quasi-judicial power by the State of Ohio as to the appellants, causing appellants such injury for which there is no adequate remedy.

This warrants the Supreme Court of Ohio to reconsider it December 20, 1996 decision and grant jurisdiction for the purpose of deciding appellants discretionary appeal on the issues presented therein, as well as upon the separation of powers issue created by the State of Ohio, an interested party, during the pendency of the appellants' memorandum in support of jurisdiction after the public interest issue had been conclusively briefed by all parties but not yet decided by this Court.

The State of Ohio, an appellee herein, represented by its Attorney General, and litigating as a party in the above captioned case, agreed that it

was legally bound in such case as this, to litigate and adjudicate this action in its Court of Claims, Appellate Court & Supreme Court in accordance with the same rules of law as are applicable to suits between private parties, pursuant to its enactment of R.C. § 2743.02(A)(1) et seq.,

As a consequence, the State of Ohio either because of waiver, constitutional prohibition, separation of powers doctrine, constitutional law and/or statutory interpretation, and common law deprived itself of the right to take any official legislative and executive state action that would interfere in any manner whatsoever with the judicial determination of any such action pending before those courts. Nor would it by official state action require the Ohio Supreme Court with respect to such pending litigation before it, to decide the controversy or its direction in favor of the State of Ohio or its political subdivisions as parties to the case. Nor would it otherwise alter or impinge on the judicial adjudication of such pending litigation. This limitation upon state action includes, but is not limited to, the repeal and/or amendment of any law that may be perceived or has as its direct, indirect or collateral effect of affecting the legal mind set of the Ohio Courts' judiciary by either impinging, influencing, or controlling the actual direction of the decision in the State's own favor or ending the pending litigation against the State of Ohio or its political subdivisions.

Appellants' legal claim of great public interest as a basis for this court granting jurisdiction to hear the

appeal from the court's below, that had granted summary judgment in favor of the appellees, rested to substantial degree on the legal issue as to whether the guardrail at the accident site, that was so obvious to plain observation as to be disparately picayune when compared to the median guardrail built parallel to it, that it was and became a public nuisance when it was built by ODOT in contravention of the statutory public policy of R.C. §§ 5591.36 & 5591.37 requiring a suitable guardrail to protect motorists from the wash banks. ODOT built the guardrail at or about the same time it built the bridge abutment wing wall that emulated a wash bank that was in close proximity to the interstate roadway. The guardrail was constructed in contravention of both ODOT's own official standard drawings applicable at the time and its manifest actual guardrail building practice in effect as evidenced by the guardrail ODOT built at adjacent bridges in the same time frame.

Appellants' issue of general public interest also was predicated upon the issue of whether the State of Ohio's tort liability for its failure to keep the public highways reasonably safe for travel required the inclusion of the federal definition of public highway that would include the safety zone designed into the right-of-way of the interstate as opposed to the existing Ohio law limiting liability only and clearly to the roadway and in certain instances to the shoulder and the berm. There was also the issue of whether political subdivision appellees were liable under R.C. § 2744.02(B)(3) for this nuisance on the interstate since it

was a public highway that passed through their respective political subdivision.

Public nuisance such as the foregoing is presumed to be a matter of great public interest since it affects both the public at large and the public safety of the motoring public on interstate in a significant way. This is reflected in a great body of federal and state statutory language wherein there is substantial statutory interplay and concern about such safety on the interstate. This is caused in part because of the substantial federal funding of the State of Ohio's building of interstate highway I-70 and the unfunded federal mandate that the State of Ohio shall be liable for torts of its making occurring thereon.

The State of Ohio, as a stakeholder in the outcome in appellants' multiple wrongful death claims, on behalf of itself and its political subdivisions, nonetheless took official state action on October 28, 1996 and perfectly timed the enactment of the repeal and amendment of the Ohio state statutes that were applicable to appellants' case sub judice. These enactments legally worked in such a way as to destroy appellants legal position before the Ohio Supreme Court on the crucial issue of whether appellants legal contentions were a matter of great public interest. Those enactments and repeals removed appellants' legal contentions as issues of great public importance thereby requiring the Ohio Supreme Court to decide the issue of great public interest in favor of the State of Ohio and its political subdivisions who were parties to the adjudications sub judice upon appeal from an appellants action

first adjudicated in the Court of Claims.

The Supreme Court by its own rule promulgated in Civil Rule 41.1(A)(1), was required to judicially notice the repeal and amendments enacted on October 28 1996, by the State of Ohio. By law, the Supreme Court was legally bound to be mindful of the legal consequences of these statutes and was lawfully required to assess and apply the legal effect of such legislation upon the appellants' contentions contained in their pending memorandum in support of jurisdiction. It then had to adjudicate whether those issues remained of great public importance after October 28, 1996, warranting appellants to the court's award of jurisdiction even though the statutes prospectively became effective date on 1-27-97. The law of nuisance as it applied to appellants case was now obviously limited to it facts since prospectively it was no longer operative as an issue of law that was legally significant as a matter of great public interest. In taking judicial notice of the repeal and amendments of these statutes the Ohio Supreme Court was bound legally to be mindful of them and assess their impact on the question of whether appellants case is a matter of great public interest as part of its December 20, 1996 decision.

The State of Ohio violates the doctrine of separation of powers and the equal protection and due process clause of the 14th Amendment to the U.S. Constitution by virtue of the presumption that it too, is bound to know the law. It therefore (1). knew that appellants had the burden of

establishing that the legal contentions of their case were issues of great public importance in order to obtain their discretionary appeal in the Ohio Supreme Court, and it (2). knew that this issue had been completely briefed by both sides and that no reply brief was permitted under the rules, and it (3). knew that under Ohio Civ. R. 44.1 (A)(1), the Ohio Supreme Court was legally and mandatorily bound to take judicial notice of the public statutory law of this state and apply it at the time of its decision, and it (4). knew that its enactment of the foregoing legislation would require the Supreme Court of Ohio to find in the favor of the State of Ohio and its political subdivisions on the issue of whether appellants case was a matter of great public interest.

The State of Ohio thereby directed the outcome of the Court's decision and ended the pending litigation against it and its political subdivisions. The fact that appellants have no remedy is evidence of the lack of due process and equal protection of the law under both the Ohio Constitution, Section 16 of Article I, & Section 2 of Article 1, and the 14th Amendment to the United States Constitution.

This Court is moved to reconsider its December 20, 1996 order and grant jurisdiction to hear appellants appeal on all the issues contained therein. The issue of State action under the circumstances described above is plainly a substantial constitutional question created solely by the conduct of appellees during the pendency of this adjudication. It is briefed herein by appellants at their first opportunity to

do so. It is also a question of great public importance in that the citizens of this state are entitled to know whether they can litigate their claims against the State of Ohio filed in the Court of Claims and appealed to State's highest court and that such claim can be fairly and honorably adjudicated by those Courts empowered to do so or whether their claim will ultimately be judicially determined by the state's legislature if it is a claim of some consequence.

Whatever happened to the public policy of this state that provided that when a tragedy of this magnitude strikes an Ohio family that the loss is to be borne by the community at large?

Respectfully submitted,

By: _____
Donald Weisberger, Counsel of Record Reg. No. 0000908
Counsel for Appellants, Kniskerns & Cavalieres

James KNISKERN, Administrator
Estate of Cynthia Ann Cavaliere et al.,
Appellants,

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Defendants-Appellees.
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Defendants-Appellees.

No. 96-1861

The Supreme Court of Ohio

December 30, 1996

MEMORANDUM IN SUPPORT OF JURISDICTION

TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS.....

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....

Proposition of Law No. I: Where an insurance carrier elects to file a declaratory judgment/interpleader action under the jurisdiction of probate court, to determine only its liability coverage under a motor vehicle insurance policy for wrongful death and personal injury caused by its insured tortfeasor, an adjudication by that court of that action is not res adjudicata, as a matter of law as to the parties thereto,

upon any other existing actions not specifically litigated, both known and unknown, involving other coverages thereunder wherein they may be insureds, thereby precluding summary judgment in favor of the insurer.....

Proposition of Law No.II: Bridge approach guardrails, wingwall bridge abutments & the designed safe zone to the right of the paved roadway on Interstate I-70 at the Deer Creek bridge, as defined by 23 U.S.C.A. § 101 & § 103, referenced in R.C. § 5516.01, are as a matter of law part of the roadway or so immediately adjacent thereto, that ODOT has a duty to the motoring public to keep them reasonably safe and free from nuisance, whereas the political subdivisions' duty under R.C § 5535.15 is limited to keeping those areas free from nuisance; and the evidence before the court was sufficient to raise issues of material facts precluding summary judgment in favor of all political defendants.....

Proposition of Law No. III: Where there is evidence that a bridge wing wall abutment on an interstate highway is one of the proximate causes of the accident for the reason it was protected by an inappropriate guardrail, each and both become a nuisance; and where the evidence also shows that the driver inexplicably left the regularly travelled portion of the roadway, such negligence being concurrent with ODOT's breach of its nondelegable duties to keep the highway reasonably safe and/or for maintaining a nuisance, the doctrine

of res ipsa loquitur is applicable to each or both, rendering ODOT and the driver jointly and severally liable to passengers sustaining an indivisible injury therefrom, precluding summary judgment.....

Proposition of Law No. IV: Where the evidence before the court shows that whether asleep, unconscious, sustaining a seizure, and/or negligent, the tortfeasor driver had the capability to leave the regularly traveled portion of the interstate highway and drive off an immediate adjacent, wing wall bridge abutment into the creek below by travelling in an approximate straight line directly behind the ODOT designed, constructed and maintained bridge approach guardrail, such fact is evidence that that particular guardrail design exposes persons travelling on the interstate to the significant type, degree and zone of danger of "accessing a perpendicular drop off in the nature of a wash bank"; and where the evidence further shows that ODOT had updated, adopted and utilized new bridge approach guardrail designs, prior to the official approval of ODOT's construction plans for the Deer Creek bridge project, that would have prevented such access and minimized the damages to persons and property motoring on I-70, but that ODOT had failed to utilize in that project its officially adopted updated standard design plans adopted as part of its standard drawings, ODOT is negligent per se and is jointly and severally liable with the driver tortfeasor for having breached its legal nondiscretionary duty to incorporate its most recent guardrail design into its

Deer Creek construction drawings and for having built and maintained what was patently by ODOT's own standards and by common sense standards an inappropriate, inherently dangerous bridge approach guardrail at the accident site, thereby precluding summary judgment in ODOT's favor.....

Proposition of Law No. V: Political subdivisions are as a matter of law, liable for breach of their nondelegable duty to keep all public highways, including interstates passing through their political subdivision, free from nuisance, pursuant to R.C.§ 2744.02(B)(3) construed in pari materia with R.C. § 5535.15, and where evidence shows that they failed to take any action whatsoever, in good faith to abate the Deer Creek bridge approach guardrail nuisance within a reasonable time following the enactment of R.C. § 5535.15, they are both jointly and severally liable to passengers injured in a motor vehicle accident, proximately caused by that long standing nuisance created by ODOT, precluding summary judgment.....

Proposition of Law No. VI. Appellate Rule No. 25's ten day deadline to file a motion to certify a conflict to the Supreme Court of Ohio to perfect an appeal that deprived appellants of their substantive right to file within the 30 day deadline of R.C. § 2501.12 is unconstitutional by being an arbitrary, unreasonable time deadline and classification with respect to the 45 day deadline provided by S.Ct.Prac.R.II § 2 to obtain a comparable result and violates the due process and equal

protection provisions of the 5th and 14th amendment to the U.S. Constitution.....

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....

PROOF OF SERVICE.....

APPENDIX

Appx. page

Opinion of the Franklin County Court of Appeals (June 28, 1996).....

Judgment Entry of the Franklin County Court of Appeals (June 28, 1996).....

STATEMENT OF FACTS/CASE

Prior to ODOT's June 1969, approval of the I-70 construction plans for both the 91 foot Deer Creek bridge and its sister bridge, the 74 foot Beaver Creek bridge, both being designed and built in the same time frame, ODOT 4 months earlier, in February 1969, had adopted new design standard drawings for approach guardrails at bridges, representing a significant change from its previous standard design drawings.

The new bridge approach guardrail design provided substantially more protection to the motorist for the same amount of guardrail.

ODOT in February 1969, had incorporated and adopted these new design concepts, into ODOT's official standard design drawings that called for a substantially curved 18 foot setback striking therefrom, the old standard drawing of a 4 foot setback. However in June 1969 ODOT approved the new guardrail design in the construction plans for the Beaver Creek bridge and the stricken guardrail design construction plans for the Deer Creek bridge.

Each of the construction design plans, required perpendicular wing wall bridge abutments that drop four feet at a 90 degree angle parallel to the paved portion of the road and vertically down to a slope that leads to the creek approximately 15 feet below bridge abutments. They were built accordingly in the same time frame on approximately the same terrain configuration.

The old design was relatively straight in its 150 foot overall length, with a short curved four foot setback from the paved shoulder at a point furthest from its attachment to the bridge. The new design was not straight, though similar in length, but was designed with a substantial flowing curve from it point of attachment at the bridge, terminating at the other end with an 18 foot setback from the paved shoulder of the Interstate I-70.

The Deer Creek median guardrail, on the other hand, was 300 feet in length and substantially curved,

protecting motorists from both the creek and the safe zone area surrounding it and the wingwall bridge abutments that existed on both sides of the bridge that were in close proximity to the paved portion of the roadway, as submitted by Appellants' expert and undisputed. The cement wing wall abutments were horizontal, parallel and in close proximity to the paved portion of the highway and had a 4 foot perpendicular drop off of 90 degrees onto a slope leading to the creek 15 feet below.

On July 15, 1992 on I-70 at about 4:30 p.m. the appellants were passengers in a Chevrolet van driven by Nino Cavaliere heading east on I-70 at about 60 m.p.h. when the van drove to its right in an approximate straight line from the regularly travelled portion of the highway and directly behind the Deer Creek approach guardrail, through a fence and launched off the wingwall abutment of the Deer Creek bridge across to the other side of the creek 16 feet below, killing 3 passengers and injuring 2 others. The driver was severely injured and has no recollection of how the accident occurred. He was driving home from his brother's graduation from medical school and was carrying his brother's wife and children and sister-in law as passengers, all of which is supported by the evidence.

A case was filed by the personal representative of the decedents and the father and next friend of the injured survivors against ODOT in the Court of Claims. The issues litigated upon summary judgment were inter alia Appellants claim that ODOT was liable to them in negligence, nuisance and absolute nuisance by

designing, building and maintaining an obsolete substandard guardrail violating ODOT's own design standards; that there is and was no executive discretion or governmental immunity for doing so for that reason and the additional public policy reason declared in R.C. § 5591.36.

This statute purports, as a matter of public policy for which counties incur liability, to protect motorists from wash banks with 90 degree drop offs. Appellants claimed that ODOT was negligent by building an inappropiate guardrail to protect the motorists from the Deer Creek wing wall bridge abutments with its 90 degree drop offs because those drop offs emulate and serve as a wash bank in close proximity to the public highway.

Another suit was filed in the Court of Common Pleas of Cuyahoga County with State Farm Insurance, the County of Madison and the Township of Somerford as defendants. Plaintiff-Appellants sought from State Farm under-insured motorist coverage following this court's decision in Savoie vs. Grange Mutual Insurance Co, (Oct 1993), 67 Ohio St.3d 500, subsequent to the driver's insurance carrier, Western Reserve Mutual Casualty Co. (WRM) had previously sought and obtained from the Probate Court of Trumbull County a declaratory judgment/interpleader and determination of its liability coverage to the dead and injured and to whom it should be paid. WRM became and was named as a necessary party defendant to this second suit because of Savoie supra, and because its underinsured motorist coverages, medical coverages and accidental death coverages were not in

issue, nor litigated in the Probate Court. State Farm settled with Appellants and upon a defendant's motion that ODOT be named a party, the case was transferred to the Court of Claims.

The claims against Somerford Township & Madison County are premised upon the breach of their statutory duty under R.C. § 2744.02(B)(3), to keep the public highways in their respective political subdivisions free from nuisance and upon the Ohio legislature's empowerment and procedural directives in April 1991, authorizing them to correct any section of road under the control of the state and any other political subdivision pursuant to R.C. § 5535.15. This, it is contended, placed the necessary control into the hands of the political subdivision defendants to perform their mandatory duty in abating the nuisance created by the inappropiate approach guardrail/wing wall at the Deer Creek accident site.

The Court of Claims granted summary judgment to all defendants and remanded the case back to Cuyahoga County Common Pleas Court for disposition with respect to defendant Nino Cavaliere, the driver. On a consolidated appeal the Tenth District Court of Appeals, Franklin County affirmed the Court of Claims judgment on June 28, 1996.

A motion to certify for conflict was filed with the Franklin Court of Appeals on July 23, 1996 and opposed on the basis that it was not filed within the 10 days as required by appellate rule 25. It is anticipated that it will be denied as not timely filed though in conformity with local appellate rule 12 of that court that allows a 30 day

period instead of a ten day period.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Where an insurance carrier elects to file a declaratory judgment/interpleader action under the jurisdiction of probate court, to determine only its liability coverage under a motor vehicle insurance policy for wrongful death and personal injury caused by its insured tortfeasor, an adjudication by that court of that action is not res adjudicata, as a matter of law as to the parties thereto, upon any other existing actions not specifically litigated, both known and unknown, involving other coverages thereunder wherein they may be insureds, thereby precluding summary judgment in favor of the insurer.

The Tenth District Court of Appeals held in the case at bar that the Plaintiff-Appellants are precluded under the doctrine of res adjudicata from litigating any issue that could have been raised in the Trumbull County Probate Court. Its opinion is in conflict with the Eighth District Court of Appeals that held opposite in the case of Jamestown Village Condominium Owners Association vs. Market Research, Inc. (1994) 645 N.E.2d 1265, 96 Ohio App.3d 678, upon the following issue:

Whether a Court's journalized declaratory judgment of a contract action qualifies as an exception to the general rule of preclusion and is res adjudicata solely as to the claim actually litigated and determined, and not as to any or all other actions, claims and issues whether known or

existing at the time of the original action and not determined thereby?

It is of great public importance for litigants to be certain as to their rights in a declaratory judgment action in Probate Court as to whether they are required to litigate all their contractual claims at once, or whether they are permitted to litigate just one issue without prejudice to the others. It is the constitutional duty of this court to resolve such conflicts in order that the people can have equal protection of the law by having the same law applied to all litigants.

Syllabus 4 of Burris v Grange Mutual Companies (1989) 46 Ohio St.3d 84, limited the jurisdiction of probate court to litigate wrongful death settlements, but did not authorize or extend jurisdiction to adjudicate an entire insurance contract. This issue of jurisdiction of Probate Court to litigate an entire insurance contract is presented in the case sub judice, in that the Franklin County Court of Appeals found just such jurisdiction in Probate Court.

Proposition of Law No.II: Bridge approach guardrails, wingwall bridge abutments & the designed safe zone to the right of the paved roadway on Interstate I-70 at the Deer Creek bridge, as defined by 23 U.S.C.A. § 101 & § 103, referenced in R.C. § 5516.01, are as a matter of law part of the roadway or so immediately adjacent thereto, that ODOT has a duty to the motoring public to keep them reasonably safe and free from nuisance, whereas the political subdivisions' duty under R.C. § 2744.02(B)(3) & R.C § 5535.15 is

limited to keeping those areas free from nuisance; and the evidence before the court was sufficient to raise issues of material facts precluding summary judgment in favor of all political defendants.

This is a case of first impression. ODOT's and political subdivisions' liability has heretofore been limited to the regularly travelled portion of the paved roadway as defined by Ohio law and Ohio statutes, without consideration of whether federal statutes defining highway and roadway are applicable and controlling of the Ohio tort law especially in the area of statutory definitions.

While this court has focused in the past on who controls the roadway for determining liability between political entities, the Ohio legislature has diffused the exclusive right to control any public highway by any one particular political entity through its enactment of R.C. § 5535.15, granting authority to any political subdivision to maintain, repair, reconstruct and improve any section of road under the control of the state or another political subdivision. This case presents the issue, as to whether any political entity is liable under these circumstances herein, as to whether all are liable, or whether some and not the others are liable. Unfortunately the accident site guardrail remains in the hazaradous condition it was and will remains so unless this Court otherwise decides the issues of this case.

Neither ODOT nor the other political subdivisions choose to take any responsibility to make any changes or repair to the accident site guardrail

when it was forseeably hazardous at the time of construction and observeable to the naked eye that it was inappropiate by the comparison of the disparity between its design and the design and length of the paralell median guardrail all of which has been confirmed by this tragic accident.

See Pasek v City of Cleveland (1983) unreported, Case no. 46367, Court of Appeals of Cuyahoga County, Eighth Appellate District in which the Court found plaintiff's contention that the city was negligent in failing to properly guard the bridge abutment by bringing its guardrail up to the abutment, created an issue of fact concerning the city's lack of care precluding summary judgment.

Proposition of Law No. III: Where there is evidence that a bridge wing wall abutment on an interstate highway is one of the proximate causes of the accident for the reason it was protected by an inappropriate guardrail, each and both become a nuisance; and where the evidence also shows that the driver inexplicably left the regularly travelled portion of the roadway, such negligence being concurrent with ODOT's breach of its nondelegable duties to keep the highway reasonably safe and/or for maintaining a nuisance, the doctrine of res ipsa loquitur is applicable to each or both, rendering ODOT and the driver jointly and severally liable to passengers sustaining an indivisible injury therefrom, precluding summary judgment. This is an issue of great public importance because it presents the issues of first impression as to whether the doctrine of res ipsa

loquitur is appropriately invoked against joint tortfeasors, where a driver breaches his duty to his passengers by inexplicably leaving the regularly travelled portion of the roadway and/or the political defendants breach their nondelegable duties to keep the highways reasonably safe and free from nuisance regardless of whether that nuisance is either on, or immediately adjacent to the regularly travelled portion of the roadway, where the passengers sustain an indivisible damage from the concurrent and joint negligence of all of the tortfeasors, thereby precluding summary judgment.

See Domany v. Otis Elevator Co. (1966) 13 Ohio Misc. 161, syllabus 5 & 6, U.S Sixth Circuit case interpreting Ohio law authorizing the application of res ipsa loquitur to joint tortfeasors. See Harris v Ohio Department of Transportation (1992) 83 Ohio App.3d 125, 614 N.E.2d 779 at pg. 883 holding "the negligence of the driver does not excuse the negligence of a third party in maintaining a nuisance adjacent to the roadway." See Weller v Worstall (1935), 196 N.E. 596, applying doctrine to driver on similar facts.

Proposition of Law No.IV: Where the evidence before the court shows that whether asleep, unconscious, sustaining a seizure, and/or negligent, the tortfeasor driver had the capability to leave the regularly traveled portion of the interstate highway and drive off an immediate adjacent, wing wall bridge abutment into the creek below by travelling in an approximate straight line directly behind the ODOT designed, constructed and maintained bridge

approach guardrail, such fact is evidence that that particular guardrail design exposes persons travelling on the interstate to the significant type, degree and zone of danger of "accessing a perpendicular drop off in the nature of a wash bank"; and where the evidence further shows that ODOT had updated, adopted and utilized new bridge approach guardrail designs, prior to the official approval of ODOT's construction plans for the Deer Creek bridge project, that would have prevented such access and minimized the damages to persons and property motoring on I-70, but that ODOT had failed to utilize in that project its officially adopted, updated, standard drawing design plans, ODOT is negligent per se, and is jointly and severally liable with the driver tortfeasor for having breached its legal nondiscretionary duty to incorporate its most recent guardrail design into its Deer Creek construction drawings and for for having built and maintained what was patently by ODOT's own standards and common sense standards an inappropriate, inherently dangerous, bridge approach guardrail at the accident site, thereby precluding summary judgment in ODOT's favor.

This is an issue of great public importance because it is a case of first impression in Ohio. Previously this Court has ruled that ODOT is not liable for its failure to make design improvements or bring existing guardrails up to design standards, but has not yet ruled as to whether ODOT is compelled to follow its own design standards once they have been implemented, where to follow the old one creates either an absolute or qualified

nuisance.

This case presents the issue in question, as to whether ODOT has executive discretion and governmental immunity, first, to ignore its own updated official approach guardrail design standards ODOT adopted before construction plan approval of that project; secondly, to proceed with construction using what it knows or should know to be a patently substandard and obsolete design; and thirdly, when it was readily apparent then following its construction as now, upon plain observation to a reasonably prudent person viewing the Deer Creek hazard, that the discrepancy between the accident site guardrail and the parallel median strip guardrail renders the accident site guardrail completely inadequate for its purpose when at the same time ODOT was utilizing the adequate new design in its contemporaneous construction at the nearby Beaver Creek bridge on I-70.

This case also presents the issue, as to whether the public policy requiring counties to protect the motoring public from wash banks with appropriate guardrails, applies to ODOT's discretion of guardrail design when ODOT is building an interstate through a county, where ODOT is constructing wing wall bridge abutments that are tantamount to wash banks.

Proposition of Law No. V: Political subdivisions are as a matter of law, liable for breach of their nondelegable duty to keep all public highways, including interstates passing through their political subdivision, free from nuisance, pursuant to R.C.§

2744.02(B)(3) construed in pari materia with R.C. § 5535.15, and where evidence shows that they failed to take any action whatsoever, in good faith to abate the Deer Creek bridge approach guardrail nuisance within a reasonable time following the enactment of R.C. § 5535.15, they are both jointly and severally liable to passengers injured in a motor vehicle accident, proximately caused by that long standing nuisance created by ODOT, precluding summary judgment.

The function of any guardrail must include a duty to prevent motorists from accessing and travelling immediately behind and parallel to it and reaching the hazard the guardrail was installed to protect against. It is contended that a guardrail on an interstate that fails to protect the motorist from such access to a perpendicular 90 degree drop off that emulates a wash bank is a nuisance as a matter of law.

ODOT, it is contended, is liable for the nuisance it created in addition to and as part of its duty to keep the roadway reasonably safe. Political subdivisions are not excused under R.C. § 2744.02(B)(3) from correcting that nuisance when they have been empowered by the Ohio legislature to correct such a nuisance in conditions by R.C. § 5535.15 nor are they immune because their duty is mandatory.

Proposition of Law No. VI.

Appellate Rule No. 25's ten day deadline to file a motion to certify a conflict to the Supreme Court of Ohio to perfect an appeal that deprived appellants of their substantive right to file within the 30 day deadline of R.C. § 2501.12 is

unconstitutional by being an arbitrary, unreasonable time deadline and classification with respect to the 45 day deadline provided by S.Ct.Prac.R.II § 2 to obtain a comparable result and violates the due process and equal protection provisions of the 5th and 14th amendment to the U.S. Constitution.

This court in 1994 approved the 30 day deadline that obtained in R.C. § 2501.12 to file a motion to certify with the Court of Appeals in the case of Birdsall vs. Stephenson (1994) 68 Ohio St.3d 353, 626 N.E.2d 946. This Court in the same year, then adopted Appellate Rule 25, effective July 1994, that allowed only 10 days to move the Court of Appeals to certify. Appellants filed their motion to certify within that 30 day rule. Appellees have objected on the basis that it is out of rule. Appellants believe that the Court of Appeals will probably decline to certify based solely on the basis of 10 day period of Appellate Rule 25.

Appellants contend that the 10 day rule in Appellate Rule 25 is fundamentally flawed in that it does not provide a reasonable time to a litigant and their counsel to ascertain in a timely fashion, using due diligence to research the law, as to whether a conflict exists in a case such as this, that involves complex issues stemming from a consolidated appeal and multiple parties defendant. Consequently it is so procedurally severe time wise, as to deny appellants/appellees a substantive right to certify their appeal issues to this court by denying litigants a reasonable time to do so. It thus deprives appellants of due process and equal protection of the law under the

5th and 14th Amendments to the U.S. Constitution. The 10 day rule to file a motion to certify requiring legal research seems patently flawed, when Supreme Court Rule IV. Section 4(B) authorizes a period of 12 days just to file and submit the Appellate decision to certify with the Supreme Court but only allows ten days for complicated research.

This a constitutional question of great public importance because it reduces the litigants' opportunity to have the law clarified and reconciled by this Court.

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Interstate highway I-70 is not really an Ohio highway but a federal highway passing through Ohio that was designed constructed and maintained by ODOT through the use of 90% federal funds. By consent the federal government delegated the responsibility to adjudicate liability for accidents occurring on it in accordance with Ohio tort law in the appropriate Ohio court.

Interstate highways are defined under federal law encompassing everything that exists between the parallel right of ways. It is especially different from other Ohio highways as appellants qualified expert, recognized by ODOT as such, has testified, in that the interstate has designed into it a "safe zone", to the right of the paved portion of the highway. It is a substantial area usually 30 feet in width extending to the borderline edge

of the right of way. This area is known as a safe zone and is designed to be utilized by drivers for both emergency and other purposes, thus remarkably reducing accidents that otherwise occur on highways without it and allowing for safe passage. The guardrails are designed in conjunction with the safe zone in order that the interstate remain safe.

In reading the Ohio cases and this court's decisions on highway accidents this writer was unable to find any decisions dealing with rights, liabilities and duties dealing with these safe zones other than the legal doctrine, that if the accident did not occur on the paved portion of the roadway there cannot be any ODOT liability for its failure to keep the roadway reasonably safe for travel. This also seems to be true with regard to political subdivisions' liability for any nuisance on a public highway.

In this particular case the accident occurred on the roadway when the driver for an unexplained reason headed in a straight line off the roadway into what ordinarily would either be a safe zone or otherwise be protected by a guardrail at the Deer Creek bridge. It was neither. The safe zone was not protected by an appropriate guardrail. Tragic injuries and death occurred to both passengers and driver when the van at high speed launched off the wing wall abutment guarded by an inappropriate guardrail into the creek.

This case is of great public interest because the facts present the question of whether a bridge wing wall abutment, protected by an inappropriate guardrail is a nuisance for which ODOT

is liable to passengers sustaining an indivisible injury from either the combined negligence of the driver and ODOT or ODOT singularly.

Additionally the old legal format often based on the concept of who controls the road or highway whereby counties are liable for county roads, townships liable for township roads etc., no longer seems viable because of the enactment of R.C. § 5535.15 especially when read in pari materia with R.C. § 2744.02(B)(3).

R.C. § 5535.15 is part of the public policy of Ohio's highway safety. Though it uses the word "may" the statute requires an interpretation of "shall" because it impacts and intertwines with the issue of public safety on the roadways and highways and because such duties imposed upon political subdivisions have been regarded as mandatory duties. Because this statute is of recent origin it has yet to be construed by this court. As a consequence this case is of great public importance because it provides this Court the opportunity to articulate the rights, duties and liabilities of those political entities that are responsible for the highways.

In conclusion this Court is respectfully requested to grant jurisdiction allowing the appeal and to hear the case on the merits on all the issues presented.

Respectfully submitted,

_____

Donald Weisberger, 0000908
Attorney for Appellant
Kniskerns & Cavalieres

Supreme Court, U.S.
FILED
MAY 30 1997
CLERK

No. 96-1729

In The

Supreme Court of the United States

October Term, 1996

JAMES KNISKERN, Administrator, Estate of CYNTHIA ANN CAVALIERE, JENNIFER KNISKERN, & FELINA CAVALIERE; GUY CAVALIERE; JOANNA CAVALIERE & MARIA CAVALIERE, Minors, By and Through Their Father and Natural Guardian, GUY CAVALIERE, ALLSTATE INSURANCE COMPANY,

Petitioners,

vs.

THE TOWNSHIP OF SOMERFORD, TRUSTEES: WALTER BETHEL, DAVID DAHUME, JAMES MORAN; THE COUNTY OF MADISON, COMMISSIONERS: HERBERT C. MARKLEY, ROBERT EDWARDS, JOE D. YODER, NINO CAVALIERE, WESTERN RESERVE MUTUAL CASUALTY INSURANCE CO., THE STATE OF OHIO, THE STATE OF OHIO DEPARTMENT OF TRANSPORTATION (ODOT),

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

PATRICK S. CORRIGAN
Counsel of Record for Respondent,
Board of Commissioners of Madison County
633 Leader Building
526 Superior Avenue, N.E.
Cleveland, Ohio 44114
(216) 696-6454

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE AFFILIATION

Respondent, Board of Commissioners of Madison County is a political subdivision of the State of Ohio.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

RESPONDENTS' BRIEF IN OPPOSITION..... 1

STATEMENT OF JURISDICTION..... 1

RULES INVOLVED 1

STATEMENT OF THE CASE..... 2

I. Course of Proceedings and Disposition of the Case Below 2

II. Correction of Misstatements in the Petition .. 3

REASONS FOR DENYING THE WRIT 4

I. This Court has no jurisdiction to consider most of Petitioner's arguments 4

II. The Tenth District Court of Appeal's affirmance of Summary Judgment and the denial of the Petition for Writ of Certiorari to the Ohio Supreme Court follow well-settled principles and further the purpose underlying Rule 56 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES CITED:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 8

Bacon v. Daniels, 37 Ohio St. 279 (1881) 5

Beck v. Washington, 369 U.S. 541 (1962) 5

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 7, 8

C.E. Morris Co. v. Foley Constr. Co., 54 Ohio St. 2d 279, 376 N.E. 2d 578 (1978) 7

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Herndon v. Georgia, 295 U.S. 441 (1935) 5

Kalish v. Trans World Airlines, Inc., 50 Ohio State 2d 73, 362 N.E. 2d 994 (1977) 5

Mitseff v. Wheeler, 38 Ohio St. 3d 112, 526 N.E. 2d 798 (1988) 7

Remley v. Cincinnati Metro. Hous. Auth., 99 Ohio App. 3d, 573, 651 N.E. 2d 450 (1994) 5

Turner v. Turner, 67 Ohio St. 3d 337, 617 N.E. 2d 1123 (1993) 8

Wing v. Anchor Media, Ltd. of Texas, 59 Ohio St. 3d 108, 570 N.E. 2d 1095 (1991) 8

Yee v. City of Escondido, 503 U.S. 519 (1992) 4

Zucht v. King, 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES CITED:

28 U.S.C. §1257 ..... 1, 5

23 U.S.C. §101-103 6

O.R.C. §2744.02 (B)(3) 8

RULES CITED:

Supreme Court Rule 15.1 3

Ohio Rules of Civil Procedure 56 [C] 2, 7

RESPONDENTS' BRIEF IN OPPOSITION

The Respondent, Board of Commissioners, Madison County, requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision dated December 20, 1996, of the Ohio Supreme Court.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. §1257 (a). The questions presented for review in the petition were never presented to the Ohio courts. These newly presented arguments may not properly be considered.

RULES INVOLVED

In addition to the rules cited by the Petitioner, the following rule is relevant.

> "The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in the rule. A summary judgment shall not be rendered unless it appears from

> such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 56 [C] of the Ohio Rules of Civil Procedure.

STATEMENT OF THE CASE

Respondent, Board of Commissioners of Madison County, respectfully opposes the Petition for Writ of Certiorari. The petition assails the Ohio judiciary for granting and affirming summary judgment, despite the utter failure of the Petitioner to present evidence sufficient to create an issue of fact. The Petitioner failed to raise at the trial court level the constitutional issues set forth in the Petition, and decries statutes enacted long after judgment was rendered.

I. Course of Proceedings and Disposition of the Case Below.

Petitioner on June 23, 1994 filed a Complaint in the Cuyahoga County Court of Common Pleas against Respondent Madison County Board of Commissioners,

alleging that the deaths and injuries sustained on Interstate 70 in Madison County, Ohio were the result of the failure of Respondents to properly maintain the guardrails and fencing on the interstate. Respondent Board of Commissioners of Madison County filed a Third Party Complaint against the Ohio Department of Transportation seeking indemnity and contribution. On February 23, 1995, Respondent removed the case to the Ohio Court of Claims, which has jurisdiction over claims against the Ohio Department of Transportation. The Court of Claims granted the Motions for Summary Judgment of all Respondents on August 15, 1995.

The Petitioner appealed to the Tenth District Court of Appeals, Franklin County, Ohio, which affirmed the Trial Court. Petitioner then on July 19, 1996, petitioned for review by the Ohio Supreme Court. The Ohio Supreme Court declined jurisdiction, and on January 29, 1997, denied Petitioner's Motion for Reconsideration.

II. Corrections of Misstatements in the Petition.

Pursuant to the United States Supreme Court Rule 15.1, Respondents bring the following misstatements of facts contained in the petition to the Court's attention.

In his first reason for granting certiorari, Petitioner improperly asserts that the Ohio Supreme Court and the Ohio Court of Appeals decided and created federal constitutional questions under the Fourteenth Amendment of the Constitution of the United States as well as state constitutional questions. The Court of Appeals merely reviewed a decision granting summary judgment in favor

of Respondent. The Record is devoid of references to the United States Constitution and the Ohio Constitution, and no constitutional questions were raised in the pleadings.

Petitioner incorrectly asserts that the State of Ohio delegated its highway maintenance duties to the Madison County Board of Commissioners. Petitioner failed to present any evidence showing that the Board of Commissioners had assumed or been delegated a duty or responsibility to maintain any portion of the interstate highway involved in the case. Uncontroverted evidence proved that the Board of Commissioners of Madison County had no duty to maintain the site at which the accident occurred.

Petitioner's most astounding misstatement in the Petition is the argument that Ohio Amended House Bill No. 350, effective as of January 27, 1997 is somehow applicable to this case. Without question, the legislation is inapplicable, since it was drafted and enacted long after summary judgment was granted.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS NO JURISDICTION TO CONSIDER MOST OF PETITIONER'S ARGUMENTS.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the State court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of state courts under 28

U.S.C. §1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in State court, question was not before this Court); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal).

Ohio law is consistent with federal law: arguments not presented to the trial court cannot be presented in the court of appeals. *Bacon v. Daniels*, 37 Ohio St. 279 (1881). A party having elected to proceed without raising a federal cause of action, may not assert on appeal the federal cause of action not considered by the Courts below. *Kalish v. Trans World Airlines, Inc.*, 50 Ohio State 2d. 73, 362 N.E. 2d. 994 (1977). The failure to challenge the constitutionality of a statute at the trial court level constitutes waiver of the claim. *Remley v. Cincinnati Metro. Hous. Auth.*, 99 Ohio App. 3rd 573, 651 N.E. 2d 450 (1994). Likewise, grounds of error not raised by assignment of error or argument in the court of appeals cannot be reviewed by the Ohio Supreme Court.

In this Court, for the first time, Petitioner argues that he has been denied substantive and procedural due process rights. Petitioner makes this argument apparently since the doctrine of sovereign immunity was applied and, further, apparently since the doctrine was applied in the Court of Claims, in which claims against the State of Ohio are exclusively adjudicated. Petitioner never cited the Fifth and Fourteenth Amendments to the United States Constitution, Section 16, Article IV of the Bill of Rights under the Ohio Constitution or Section 2, Article IV of the Ohio Constitution in his case below.

Petitioner perilously relies on the reference to 23 U.S.C. §101-103 in an expert affidavit as grounds for presenting a federal question below. Petitioner boldly questions the validity of the Ohio Court of Claims, the statutes governing sovereign immunity, and, incredibly, legislation which was enacted long after his case was ruled upon. Elementary law dictates that the validity of state law may only be drawn in question by objections properly asserted in the courts below, and that this Court has a duty to decline jurisdiction when it appears that the constitutional question presented is not substantial in character. *Zucht v. King,* 260 U.S. 174, 43 S. Ct. 24, 67 L. Ed. 194 (1922). The petition fails to account for the requirements for review in this Court.

The decisions of the trial court and the court of appeals rest largely on the Petitioner's lack of evidence. A finding of no evidence by a state trial court, which is affirmed on appeal, presents no issue deserving of this Court's attention. *See Graber Tank & Mfg. Co. v. Linde Air Prods. Co.,* 336 U.S. 271, 275 (1949), *reh'g granted,* 337 U.S. 910 (1949), *adhered to in part, reversed in part,* 339 U.S. 605 (1950) ("A court of laws, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."). Petitioner clearly lacks the requisite grounds for review in the United States Supreme Court.

II. THE TENTH DISTRICT COURT OF APPEALS AFFIRMANCE OF SUMMARY JUDGMENT AND THE DENIAL OF THE PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT FOLLOW WELL-SETTLED PRINCIPLES AND FURTHER THE PURPOSE UNDERLYING RULE 56.

The opinion of the Tenth District Court of Appeals and the Ohio Supreme Court's denial of the Petition for Writ of Certiorari are consistent with established case law. The trial court applied Rule 56 of the Ohio Rules of Civil Procedure, and found no question of material fact sufficient to send the case to trial. The Court of Appeals eschewed the obfuscation in the assignments of error presented by the Petitioner, and reviewed the trial court's ruling in accordance with the proper standard of review for summary judgment.

Ohio has adopted the summary judgment standard set forth by the United States Supreme Court. A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be revised by a reviewing court as being against the manifest weight of the evidence. *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, 376 N.E. 2d 578 (1978). The Court of Appeals followed the Standard set forth by this Court as adopted by the Ohio Courts.

"Under Civ. R. 56 [C], the party seeking summary judgment has the initial burden to identify those elements of the nonmoving party's case which do not raise genuine issues of material fact and upon which the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 114-115, 526

N.E. 2d 798, 801 (1988). When the moving party satisfies its burden, the nonmoving party cannot rest on the allegations in the pleadings, but has a "reciprocal burden" to set forth specific facts demonstrating that there is a "triable issue of fact." *Id.* at 115-116, 526 N.E. 2d at 801; *Wing v. Anchor Media, Ltd. of Texas*, 59 Ohio St. 3d 108, 570 N.E. 2d 1095 (1991), paragraph three of the syllabus (approving and following *Celotex, supra*).

Because the standard for summary judgment mirrors the standard for a directed verdict, the evidentiary material must establish that the nonmoving party's claim is more than simply colorable. *Celotex, supra*, 477 U.S. at 323, 106 S. Ct. at 2552, 91 L. Ed. 2d at 273-274. Whether a genuine issue of material fact exists depends on whether the evidence presents "a sufficient disagreement to require submission to a jury" or whether it is so "one-sided that one party must prevail as a matter of law." *Turner v. Turner*, 67 Ohio St. 3d 337, 340, 617 N.E. 2d 1123, 1126 (1993) (citing *Anderson v. Liberty Lobby, Inc.*), 477 U.S. 242, 251-252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 213-214 (1986).

The Court of Appeals found that the "Guardrail was not a nuisance under R.C. 2744.02 (B)(3), as a matter of law". *See*, Court of Appeals decision, A 20. Further, the Court properly stated that "Although plaintiffs claim that other sections of the Revised Code place a duty upon the county. . . . (Petitioners) have not identified any section of the Revised Code which even arguably imposes liability upon either the county or township. . . . " *See*, Court of Appeals decision, A 22. The reviewing Court examined the evidence *de novo*, and affirmed the trial court.

The Petitioner failed to interpose a shred of evidence that Respondents had a duty to Petitioner or that Respondent was somehow the proximate cause of the terrible accident. Given the absence of evidence, this matter was properly disposed of by the Ohio Courts, and does not merit review in this forum.

CONCLUSION

Petitioner's failure to raise constitutional and federal issues below, and the absence of sufficient reason to review the well settled law of the State of Ohio warrants the denial of the writ of certiorari.

Respectfully submitted,

PATRICK S. CORRIGAN
Counsel of Record for Respondent, Madison County Board of Commissioners
BERLON & TIMMEL
526 Superior Avenue, N.E.
633 Leader Building
Cleveland, Ohio 44114
(216) 696-6454